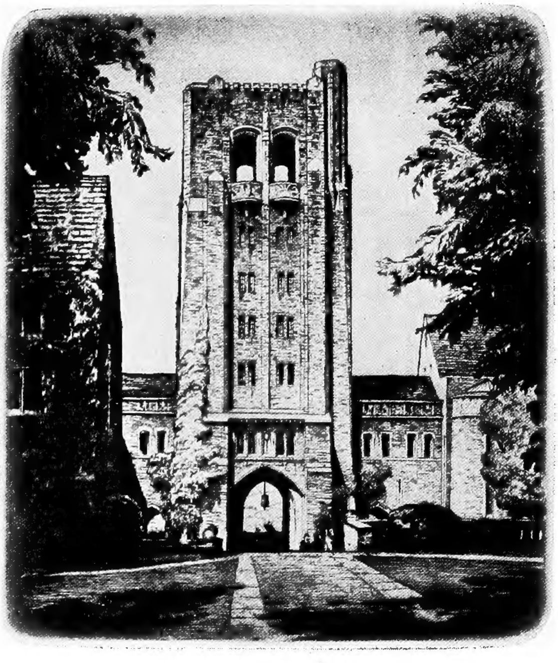

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A TREATISE ON THE LAW

PERTAINING TO

CORPORATE FINANCE

INCLUDING

THE FINANCIAL OPERATIONS AND ARRANGEMENTS

OF PUBLIC AND PRIVATE CORPORATIONS

AS DETERMINED BY

THE COURTS AND STATUTES

OF THE UNITED STATES AND ENGLAND

By

WILLIAM A. REID

OF THE NEW YORK BAR

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VOL. I

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PREFACE.

This work is a practical treatise upon the law of "Corporate Finance" — The Financial Operations and Arrangements of Public and Private Corporations — as declared by the courts in a large collection of cases. The idea in the preparation of the work has been that a lawyer searching for law adapted to his case would be aided by a work giving the rules declared by the courts, and, as far as necessary, showing how these conclusions were reached, the reasoning of the courts, and the application of the law to the particular cases as exemplified by the facts therein. In the text such a statement of facts, when necessary, has been made as will give an accurate idea of the case presented to the court, and the rules declared. The notes contain, in many cases, the full reasoning or argument of the courts in support of the rules, and frequently a differentiation of cases which may be assumed to be in conflict with the rules declared.

Especially has the author thought a work prepared upon this plan would be of great use to those who have not access to large libraries. I trust it may prove a ready and useful help to those who may use it.

WM. A. REID.

NEW YORK CITY, *January*, 1896.

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CORPORATE FINANCE

THE FINANCIAL OPERATIONS AND ARRANGEMENTS

OF PUBLIC AND PRIVATE CORPORATIONS

CHAPTER I.

GENERAL POWER TO INCUR PECUNIARY LIABILITY — PUBLIC CORPORATIONS.

SECTION I. **General rules applicable to public corporations.** —All public corporations are limited to the exercise of those powers which are expressly granted or which are necessarily or fairly implied in or incident to the powers expressly granted, or which are essential to the declared objects and purposes of such corporations.[1] Corporations and their officers can only act within the scope of the powers conferred by their charters, and such powers are to be construed strictly.[2] A municipal corporation

[1] Town of Harwood *v.* Hamilton, (1883) 13 Bradw. 358; Cook County *v.* McCrea, 93 Ill. 236; People *v.* Village of Crotty, 93 Ill. 180; Petersburg *v.* Metzker, 21 Ill. 205; Schott *v.* People, 89 Ill. 195. In Law *v.* People, (1877) 87 Ill. 385, the Supreme Court of Illinois said upon the power of municipal corporations: "The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act. Such corporations are created for governmental and not for commercial purposes. Hence power to borrow money or create indebtedness is not an incident to such local governments, and the power cannot be exercised unless it is conferred by their charter, and no one has the right to presume the existence of such power, and persons proposing to loan money to these bodies must see that the power exists."

[2] Minturn *v.* Larue, 23 How. 435; Thomson *v.* Lee County, 3 Wall. 327; Thomas *v.* City of Richmond, 12 Wall. 349; Clark *v.* Davenport, 14 Iowa, 494; Merriam *v.* Moody's Exrs., 25 Iowa, 163; Nichol *v.* Mayor, etc., 9 Humph. 252; Leonard *v.* Canton, 35 Miss. 189;

has no general authority to exchange promises with other corporations or persons; its contracts to be valid, must be within the scope of the authority conferred upon it by law and for municipal purposes.[1] A municipal corporation, as a general rule, cannot incur any liability not authorized by the statute or charter by which it is created.[2] Counties, in the absence of legislative authority, have no power to borrow money and execute their obligations for the loan, notwithstanding a purpose to apply the money to the use of the public.[3] The statutory grant in Kansas to county commissioners to borrow money to meet current expenses, when a deficit exists in the county revenue, only authorizes a borrowing when the deficit has actually occurred.[4]

§ 2. **Distinction between public and private corporations.** — Political corporations, in their organization and purposes, are essentially different from private corporations. The former are created to aid in the government of the people, the latter to promote trade, manufactures and a variety of other interests. Private corporations are usually endowed with all the powers and rights of an individual, so far as they can be conferred. And the power to contract debts and to issue evidences of the same is an incident equally attending their creation. When authorized to perform an act, unless restricted by the charter, they may employ the means and perform the act in the same manner that might be done by a private individual. This is necessarily so to effectuate the purpose of their foundation with most private corporations. Municipal corporations, however, being created for purposes of government, and authorized as it were to exercise, to a limited extent, a portion of the power of the state government, have

Douglass v. Placerville, 18 Cal. 643; Argenti v. San Francisco, 16 Cal. 255, 282; Wallace v. San José, 29 Cal. 180; City of Lafayette v. Cox, 5 Ind. 38; Bank v. Chillicothe, 7 Ohio, 31, pt. II; Collins v. Hatch, 18 Ohio, 523; Kyle v. Malin, 8 Ind. 34; Willard v. Killingworth, 8 Conn. 247; Brady v. Mayor, etc., 20 N. Y. 312; Hodges v. Buffalo, 2 Denio, 110; Halstead v. Mayor, etc., 3 N. Y. 430; Boom v. Utica, 2 Barb. 104.

[1] Cooley, J., in Thomas v. City of Port Huron, (1873) 27 Mich. 320

[2] Wheeler v. County of Wayne, (1890) 132 Ill. 599; s. c., 24 N. E. Rep. 625, affg. 31 Ill. App. 299; Cook County v. McCrea, 93 Ill. 236; City of Champaign v. Harmon, 98 Ill. 491; Schott v. People, 89 Ill. 195; People v. Village of Crotty, 93 Ill. 180.

[3] Crittenden County Court v. Shanks, (1889) 88 Ky. 475; s. c., 11 S. W. Rep. 468.

[4] Lewis v. Comanche County, 35 Fed. Rep. 343.

always been held to act strictly within their charter. It is to them their fundamental law, and their power is only co-extensive with the power granted. Not being essential to the purposes and object of their creation, without an express grant of power for the purpose, they have no authority to contract debts, binding upon the body or individual residing within their limits. Such a power being unusual when they are created, and usually being conferred, if at all, by special enactment, and all persons familiar with the fact, it is but natural that those who deal with them, or in their obligations, should see to it that the body possesses the power to bind itself for their payment. On the other hand, the object of private corporations usually renders it necessary that they should transact such business as may involve the necessity of incurring debt.

§ 3. **Borrowing money.**— In a case arising in Ohio, frequently cited as authority, the Supreme Court of that state held that a town corporation, invested with the powers usually conferred upon such bodies, could enter into a contract for a loan of money to be used by the town, which would bind the corporation for repayment, although no express power to borrow money be given in the law incorporating the town.[1] The court upheld the

[1] President, etc., Bank of Chillicothe *v.* Mayor, etc., Town of Chillicothe, (1836) 7 Ohio (Pt. II) 31. It was said by HITCHCOCK, J., delivering the opinion for the court, after referring to certain provisions in the charter of the town: "From these extracts it will be seen that this corporation, as by that law constituted, had legislative power; this power, it is true was restricted to such powers as should seem necessary for the internal safety and convenience of said town of Chillicothe, and restricted, too, so far that the laws made and published should not be contrary to the laws of the state or of the United States. It had the power further 'to purchase, receive, possess and convey any real or personal estate for the use of the town, to erect and repair public buildings for the benefit of said town,' etc. If the power to borrow money be, as is insisted by counsel, a *substantial legislative power*, or, according to my apprehension of the subject, an incident to legislative power, and, if it became necessary for the safety and convenience of the town, or to carry into effect the power granted to purchase real or personal estate, or to erect or repair public buildings, to borrow money, there could be no objection to passing a law or ordinance to that effect. When passed, it would be obligatory on the corporation, and the money procured would constitute a debt which the corporation must discharge. Such law would contravene no principle of the Constitution or laws of the state or of the United States, or any principle contained in the charter of incorporation. To effect other subjects [objects?] than those specified in the charter, money could not with pro-

power of the corporation to borrow money as incident to the powers expressly granted in the charter of the town. But a municipal corporation in Ohio has no power to borrow money except in conformity with the statute of that state, which provides that "all bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance," and another statutory provision that such bonds shall be advertised and sold at auction to the highest bidder.[1]

§ 4. The United States Supreme Court on borrowing money.— A majority of the Supreme Court of the United States has held that the power to borrow money does not belong to a municipal corporation as an incident of its creation. To be possessed, it must be conferred by legislation either express or implied. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. For its payment, however, the corporation must look to and rely on taxation, the legitimate mode of raising the funds for the purpose.[2]

priety be borrowed * * * An amendment to the charter conferred upon the mayor and common council the power to pass and publish all such laws and ordinances as to them shall appear necessary for regulating the streets, alleys and highways, and for cleansing, raising, draining, paving, turnpiking or otherwise keeping the same in repair. * * * If, in effecting any of these objects, it become necessary to borrow money, the corporation might with propriety do it. In one of the cases now before the court the money was borrowed expressly for improving one of the streets. For the purpose of purchasing real estate, erecting and repairing public buildings, cleansing, raising, paving, draining, turnpiking and otherwise keeping streets in repair contracts must necessarily be made. Ultimate payment, it is true, must be made from taxation. But until money could be thus raised it seems to the court that it might be provided otherwise, and in no way better than by borrowing. And really, I cannot see the great difference whether a corporation shall be indebted to A. for labor in repairing streets or buildings, or to B. for money borrowed to pay A. for the same labor. The moral obligation to pay would be the same in either case."

[1] Mt. Adams, etc., Inclined Ry. Co. *v.* City of Cincinnati, 25 Wkly. Law Bull. 91; Rev. St. Ohio, §§ 2703, 2709.

[2] Mayor *v.* Ray, (1873) 19 Wall. 468. Justice Bradley in the opinion rendered by him for the majority of the court, said: "A municipal corporation is a subordinate branch of the domestic government of a state. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution it exists for the benefit of

§ 5. The New Jersey Court of Errors and Appeals on borrowing money.— Soon after this ruling of the Supreme Court of the United States, the Court of Errors and Appeals of New Jersey held that municipal corporations, in the absence of a specific grant of power, do not, in general, possess the power of borrowing money, and that a note given by a town in New Jersey for an unauthorized loan could not be enforced, even though the money borrowed had been expended for municipal purposes.[1]

the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different; when this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. * * * The system of local and municipal government is copied in its general features from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an act of Parliament authorizing it. We believe no such practice has ever obtained." See Wells *v.* Town of Salina, 119 N. Y. 280; s. c., 23 N. E. Rep. 870.

[1] Town of Hackettstown *v.* Swackhamer, (1874) 37 N. J. Law, 191. Beasley, Ch. J., in an elaborate opinion, discussed the question in the following language: "At the present time it seems to be generally conceded that a private corporation, constructed with a view to pecuniary profit, has, by implication, when not in this particular specially restricted, the power in question. The law was so held in this state, in the case of Lucas *v.* Pitney, 27 N. J. Law, 221, and the same rule has been repeatedly recognized in other decisions. And this result is the appropriate product of the principle that corporate powers which are the necessary accompaniments of powers conferred, will be implied. In these instances the ability to borrow money is so essential that without it the business authorized could not be conducted with reasonable efficiency, and as it cannot be supposed that it was the legislative intent to leave the company in so imperfect a condition; the inference is properly drawn that the power to raise money in this mode is inherent in the very constitution of such corporate bodies. Such a deduction is simply, in effect, a conclusion that the lawmaker designed to authorize the use of the means fitted to accomplish the purpose in view. It has been often said that the means which can be thus raised up by implication must be necessary to the successful prosecution of the enterprise, and that the circumstance that they are convenient will not deputize their introduction. But the necessity here spoken of does not denote absolute indispensableness, but that the power in question is so essential that its non-existence would render the privileges granted practically inoperative or incomplete.

§ 6. **Issue of negotiable securities.**—A majority of the Supreme Court of the United States, while conceding that vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of a municipality, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes, looked upon the investing of such documents with the character and incidents of commercial paper so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraud-

It is consequently obvious that a presumption, resting on such a basis as this, must spring up in favor of almost the entire mass of commercial and manufacturing corporations, for without the franchise to effect loans the chartered business could be but imperfectly transacted. And, yet, even in such instances, the usual inference that such an implied power exists may be repelled by the language of the particular charter or the peculiar circumstances of the case. In a word, the rule of law in question is nothing but the discovery, by the courts, of the legislative intent, such intent having been ascertained by a construction of charters, as applied to the subject-matters. Taking this as the ground of our reasoning I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. I do not wish to be understood as indicating that under certain special conditions an opposite deduction may not be legitimately drawn. It is plain that it is practicable to impose a duty on a municipality requiring the immediate use of sums of money, and in such a situation the inference may become irresistible that it was intended that funds were to be provided by loans. My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary municipal operations cannot be efficiently carried on except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been, and are now being, improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have

ulently issued, as an abuse of their true character and purpose; as having the effect of converting a municipal organization into a trading company and putting it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. They held that no such power legally existed, unless conferred by legislative enactment, either express or clearly implied.[1] The

been found amply sufficient for these purposes. Consequently I am unable to perceive any necessity to borrow money, under these conditions, from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached, without a resort to the device of raising money by loan, there is not the least legal basis for a claim of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question cannot be called into existence by intendment, and, as I claim the fact to exist, I must, of necessity, reject the right of implication in question."

[1] Mayor *v.* Ray, (1873) 19 Wall. 468. Mr. Justice BRADLEY, in the opinion delivered by him, said: "There are cases, undoubtedly, in which it is proper and desirable that a limited power of this kind should be conferred, as where some extensive public work is to be performed, the expense of which is beyond the immediate resources of reasonable taxation, and capable of being fairly and justly spread over an extended period of time. Such cases, however, belong to the exercise of legislative discretion, and are to be governed and regulated thereby. Where the power is clearly given, and securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally. But where the power has not been given, parties must take municipal orders, drafts, certificates and other documents of this sort at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable; that is, transferable by delivery or indorsement. This quality renders them more convenient for the purposes of the holder, and has undoubtedly led to the idea subsequently, but, we think, erroneously, entertained, that they are invested with that other characteristic of commercial paper — freedom from all legal and equitable defenses in the hands of a *bona fide* holder. But every holder of a city order or certificate knows that to be valid and genuine at all it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose; another's acts cannot create an estoppel against the city itself, its taxpayers, or people. Persons receiving it from them know whether it is issued and whether they receive it for a proper purpose and a proper consideration. Of course, they are affected by the absence of these essential ingredients, and all subsequent

Supreme Court of Louisiana has held that, in the absence of express legislative authority, a municipal corporation has no power to utter unconditional obligations to pay money. Such a corporation may, however, issue evidences of liability for consideration received for ultimate payment, depending upon contingencies which must have happened before any right of action can accrue.[1]

holders take *cum onere* and are affected by the same defect. Much less can any precedent be found (except of modern date and in this country) for the issue, by local civil authorities, of promissory notes, bills of exchange and other commercial paper. At a period within the memory of man the proposal of such a thing would have been met with astonishment. The making of such paper was originally confined to merchants. But its great convenience was the means of extending its use, first, to all individuals, and afterwards to private corporations having occasion to make promises to pay money. Being only themselves responsible for the paper they issue, no evil consequences can follow sufficient to counterbalance the conveniences and benefits derived from its use. They know its immunity in the hands of a *bona fide* holder from all defenses and equities. Knowing this, if they choose to issue it, no one is injured but themselves. But if city and town officials should have the power thus to bind their constituencies it is easy to see what abuses might and probably would ensue. We know from experience what abuses have been practiced where the power has been conferred. Fraudulent issues, peculations and embezzlements and the accumulation of vast amounts of indebtedness without any corresponding public benefit have been rendered easy and secure from merited punishment. The purpose and object of a municipal corporation do not ordinarily require the exercise of any such power. They are not trading corporations and ought not to become such. They are invested with public trusts of a governmental and administrative character; they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order and general well-being of the community as a political society and district, and invested with power by taxation to raise the revenues necessary for those purposes. The idea that they have the incidental power to issue an unlimited amount of obligations of such a character as to be irretrievably binding on the people, without a shadow of consideration in return, is the growth of a modern misconception of their true object and character. If, in the exercise of their important trusts, the power to borrow money and to issue bonds or other commercial securities is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provision for future repayment. Without such authority it cannot be legally exercised. It is too dangerous a power to be exercised by all municipal bodies indiscriminately, managed as they are by persons whose individual responsibility is not at stake."

[1] Newgass *v.* City of New Orleans, (1890) 42 La. Ann. 163; s. c., 7 So. Rep. 565. That a municipal corporation has not an incidental or implied power to make or issue negotiable paper, see New Orleans, M. & C. R. R. Co. *v.* Dunn, 51 Ala. 128; Blackman *v.* Lehman, 63 Ala. 547.

§ 7. Power of Indiana cities to issue bonds.— A city in Indiana has power, under a charter authorizing it "to borrow money for the use of the city," to issue bonds for money so borrowed.[1]

§ 8. Miscellaneous rules as to issuing bonds.— Municipal corporations in which power is vested by legislative grant to make expenditures for purposes of a certain kind, unless prohibited by law, may make contracts for the accomplishment of those purposes, thereby incur indebtedness and issue proper evidences of indebtedness in payment for the same.[2] A county in Kansas has power to borrow money for the erection of county buildings, and to issue its bonds for the money borrowed.[3] The officials of a municipal corporation, which is vested with the usual power of such bodies, are authorized to issue bonds or promissory notes to

[1] City of Evansville *v.* Woodbury, (1894) 60 Fed. Rep. 718; s. c., 9 C. C. A. 244, following Railroad Co. *v.* Evansville, 15 Ind. 395, which adopted the following from Slack *v.* Railroad Co., 13 B. Mon. (Ky.) 1, to wit: "Moreover, the first act under which the debt was created gave full power to the County Court to provide for its payment either by taxation or by borrowing the money, which, of course, implied the power, as it did the necessity, of furnishing some evidence of indebtedness, another court might doubtless have issued the bonds of the county in some form to the lender." In City of Evansville *v.* Woodbury, *supra*, the United States Circuit Court of Appeals, speaking through SEAMAN, D. J., had this to say as to the rule declared in the text: "The borrowing of money to pay outstanding indebtedness of the city was clearly a borrowing for the use of the city; and if this ruling (in Railroad Co. *v.* Evansville, *supra*) must govern here, the power to issue the bonds is well shown. That decision appears to have remained undisturbed, and is in accord with the doctrine constantly held by that court. Dill. on Mun. Corp. § 119. It is worthy of note that the Supreme Court of the United States held directly the same construction upon a grant of power 'to borrow money for any public purpose' in Rogers *v.* Burlington, 3 Wall. 654, and Mitchell *v.* Burlington, 4 Wall. 270. These decisions were five and six years after that in Indiana; and although they appear to have been overruled in recent years, they would constitute some justification, if any were needed, for reliance by purchasers upon the Indiana interpretation. The federal courts have maintained a rule from their organization that in all cases depending upon a state statute, they will adopt and follow the adjudications of the court of last resort in its construction, when that construction is well settled, and without injury as to its original soundness. * * * Therefore, the recent decisions in Merrill *v.* Monticello, 138 U. S. 673; s. c., 11 Sup. Ct. Rep. 441, and Brenham v. Bank, 144 U. S. 173; s. c., 12 Sup. Ct. Rep. 559, * * * are not applicable."

[2] Police Jury *v.* Britton, 15 Wall. 566.

[3] Comanche County *v.* Lewis, 133 U. S. 198.

evidence the credit price of any works for which they are authorized to contract, which in the hands of a *bona fide* holder, will be protected by the law merchant.[1] A city, by the issue of its bonds according to law, having created a debt against itself, has power, like any other debtor, to enter into negotiations concerning such bonds, and to have them delivered up for cancellation and new bonds issued in exchange for them, without any special grant of authority therefor.[2] The charter of a city empowering it "to borrow, on the credit of the city, a sum of money not exceeding [a sum named]; to issue bonds, scrip, or certificates of indebtedness therefor," etc., with a provision that "with the money so borrowed the city council shall first liquidate and discharge all legal indebtedness of the city," may issue such bonds as they deem proper within the terms of the charter, and with the proceeds take up the floating indebtedness of the corporation.[3] Towns in Maine must be expressly or impliedly authorized by statute, or they cannot borrow money and issue notes of a commercial character for the execution of their ordinary business.[4] The governing powers of counties are not authorized by the statutes of Illinois which empower them "to make all contracts and do all other acts necessary to the exercise of its corporate powers," and "to manage the county funds and county business, except as otherwise specifically provided," to issue bonds without a vote of the people.[5] A grant of authority to a municipal corporation to issue "refunding bonds" or original bonds to procure money for use in the "legitimate exercise of the corporate powers," and for the payment of legitimate corporate debts does not carry with it power to issue bonds to replace in the treasury money already used in paying prior bonds.[6] A municipal corporation having statutory power to issue bonds for loans lawfully made has, by necessary implication, also

[1] Holmes *v.* City of Shreveport, (1887) 31 Fed. Rep. 113, in which case the bonds sued upon were issued for public improvements. As to authority of corporations to give notes to evidence indebtedness, see Brode *v.* Firemen's Ins. Co., 8 Rob. (La.) 244; Edey *v.* City of Shreveport, 26 La. Ann 636; City of Shreveport *v.* Flournoy, 26 La. Ann. 709; Desmond v. Jefferson, 19 Fed. Rep. 483.

[2] Rogan *v.* City of Watertown, (1872) 30 Wis. 259.

[3] City of East St. Louis *v.* Maxwell, (1881) 99 Ill. 439.

[4] Parsons *v.* Monmouth, 70 Me. 262.

[5] Locke *v.* Davison, 111 Ill. 19. As to authority to issue bonds, see Bannock County *v.* Bunting, (Idaho) 37 Pac. Rep. 277; Hotchkiss *v.* Marion, 12 Mont. 218.

[6] Coffin *v.* City of Indianapolis, (1894) 59 Fed. Rep. 221.

the power to make the bonds negotiable.[1] A County Court in Missouri with statutory authority to make bonds issued for the purpose of improving public roads transferable in such manner as by its order it might direct, may issue negotiable bonds; and this may be done by the issue of such bonds, without an order prescribing their form.[2] And under the statutory authority to issue bonds to pay for improving public roads, and "building culverts and bridges to secure permanent and good roads," the county may issue bonds to pay for riprapping around the abutment of a bridge to prevent its becoming a wreck.[3] Under the laws of Washington giving municipal corporations authority to provide means for constructing works of public utility by issuing and selling negotiable bonds there is authority to make such bonds payable in gold coin of the present standard weight and fineness.[4] Municipal corporations may issue new bonds with coupons for future interest for the purpose of funding debts, with accrued interest existing prior to the adoption of the amendment of the State Constitution of Indiana prohibiting municipal corporations from becoming indebted to an amount in the aggregate exceeding two per centum on the value of their taxable property, and providing that all obligations in excess of such amount shall be void, as the amendment is only prospective in its operation.[5]

[1] City of Cadillac *v.* Woonsocket Inst. for Savings, (1893) 58 Fed. Rep. 935; s. c., 7 C. C. A. 574; LURTON, Ch. J., said: "The case of Brenham *v.* Bank, 144 U. S. 173; s. c., 12 Sup. Ct. Rep. 559, has no bearing upon this question. Nothing more is there decided than that an act empowering a city to "borrow for general purposes not exceeding $15,000 on the credit of the city" did not authorize the issuance of negotiable obligations for the money so borrowed.

[2] Catron *v.* LaFayette County, 106 Mo. 659; s. c., 17 S. W. Rep. 577.

[3] Ibid. As to the power of counties to issue negotiable securities, see Francis *v.* Howard County, 50 Fed. Rep. 44, following Nolan County *v.* State, 83 Tex. 182; s. c., 17 S. W. Rep. 823; Robertson *v.* Breedlove, 61 Tex. 316. As to a limitation upon the issue of bonds, see Francis *v.* Howard County, 50 Fed. Rep. 44, following Russell *v.* Cage, 66 Tex. 428; s. c., 1 S. W. Rep. 270.

[4] Moore *v.* City of Walla Walla, (1894) 60 Fed. Rep. 961.

[5] Powell *v.* City of Madison, (1886) 107 Ind. 106. The court said: "The issuing of new bonds to provide, at their par value, for the payment of an old debt or the substitution of new evidences of a pre-existing debt, is not, in any legal or proper sense, the creation of a new indebtedness. Nor is the funding of interest already due, or the execution of coupons for the payment of interest which will thereafter accrue upon a pre-existing indebtedness, either the creation of a new debt, or, in legal contemplation, an increase of such pre-existing indebtedness."

§ 9. Bonds issued for the erection of a county court house.— A statute authorizing the electors of a county to empower the commissioners of such county to "borrow money" for the erection of a court house does not authorize them to empower such commissioners to issue bonds for that purpose.[1] The authority to issue bonds as an evidence of indebtedness might perhaps follow as an incident of the right to borrow money, but in that case the amount of money borrowed should equal the amount for which the bonds call. There is no right to issue them and sell them for what they will bring.[2] County warrants issued for the purpose of erecting a county court house in Nebraska have been held void where their issue was not authorized by a vote of the qualified electors of the county, and no benefit whatever resulted to the county from the issuing of such warrants.[3]

§ 10. Funding county indebtedness by issuing interest-bearing bonds.—There is no authority of law for a county board in Illinois to fund county indebtedness or issue interest-bearing bonds for money with which to take up outstanding county orders and obligations without a vote of a majority of the legal voters of the county; and such a vote having been obtained, the interest on the bonds is limited to eight per cent. Such boards are not given by the statute which provides that they shall have power "to manage county funds and county business, except as otherwise specially provided," an absolute and unlim-

[1] Lewis *v.* Board of County Commissioners of Sherman County, (1881) 2 McCrary, 464, holding certain bonds issued by the commissioners for erecting a court house invalid, on the following grounds: Because of the lack of statutory authority to vote for such bonds; because no bonds had ever been voted for any such purposes; because none of the bonds or the proceeds thereof were ever used to build a court house or were ever used for any other purpose by the county; and because the bonds contained no recitals showing that they had been issued conformably to law. Certain bridge bonds issued by the county, reciting that they were issued conformably to law, were, however, held valid in the hands of an innocent purchaser for value in open market, the bridges having been built in the county by direction of the county, for the county, and having been paid for by such bonds or their proceeds, although they were not in fact authorized by the vote of the people as the law required.

[2] Lewis *v.* Board of County Commissioners of Sherman County, (1881) 2 McCrary, 464, supported by Scipio *v.* Wright, 101 U. S. 665.

[3] Brown *v.* Board of County Commissioners of Sherman County, (1881) 2 McCrary, 469.

ited power of management of county funds, there being an absence of any specific provision of law to the contrary.[1]

§ 11. **Issue of bonds to pay subscriptions to stock of railroad corporations.**— There has not been uniformity in the decisions of the state and federal courts as to whether or not the grant of legislative authority to subscribe carried with it as an incident the power to issue bonds in payment of the subscriptions. The Supreme Court of Connecticut, at an early date, held that a city empowered to subscribe to the stock of a railroad corporation and to effect loans of money as a means of paying its subscriptions, upon the proper vote of its tax-paying citizens, had authority to issue its bonds to the railroad corporation in payment of such subscriptions;[2] this upon the established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted.[3] The following are the views entertained by the Supreme Court of Pennsylvania: The power given a municipal corporation to

[1] Locke *v.* Davison, (1884) 111 Ill. 19, affirming a decree granting an injunction against the payment of ten per cent interest on the funding bonds issued by this county board; following County of Hardin *v.* McFarlan, (1876) 82 Ill. 138, holding that under the act which enabled counties to liquidate their debts, providing that the County Courts or boards of supervisors might levy a special county tax for that purpose, those debts could be discharged by the levy of such tax, and the county board had no authority to take up its outstanding orders and give bonds in lieu thereof, bearing interest, as such obligations could not be issued in the absence of statutory authority. The court in this case distinguished City of Galena *v.* Corwith, 48 Ill. 423, in that "the decision in that case was based upon the ground that the city, by its charter, had power to borrow money, and not having been restricted as to the means of exercising this power, could issue the bonds." They further said; "It was held in Commissioners of Highways *v.* Newell, 80 Ill. 587, that more was said in that case than the subject justified, and that it needed modification confining it to cases where the charter of the corporation expressly grants a power, for a corporation cannot exercise any powers save those granted or necessarily implied in order to carry into effect a granted power." Upon the subject of contracting for interest on the part of counties, see also Madison County *v.* Bartlett, 1 Scam. (Ill.) 67; County of Pike *v.* Hosford, 11 Ill. 170; Hall *v.* Jackson County, 95 Ill. 352; County of Jackson *v.* Rendleman, 100 Ill. 379.

[2] City of Bridgeport *v.* Housatonuc R. R. Co., (1843) 15 Conn. 475.

[3] Seybert *v.* City of Pittsburg, 1 Wall. 272; R. R. Co. *v.* County of Otoe, 16 Wall. 667; Evansville, etc., R. R. Co. *v.* City of Evansville, 15 Ind. 395.

subscribe for stock of a railroad company gives the power to create a debt, and to give an evidence of it. The power to execute and issue bonds, contracts or other certificates of indebtedness belongs to all corporations, public as well as private, and is inseparable from their existence. For a legal and authorized debt a municipal corporation may give its bond under its general corporate powers. A municipal bond in payment of a subscription to stock of a railroad company, if invalid, is so, not because the corporation has no power to issue bonds, but because the subscription to the stock is outside of the power of the corporation; and when a city has been authorized to make such a subscription by the legislature it becomes a debt like any other, and may be evidenced in the same way. Bonds issued in payment of the debt are valid obligations of the corporation.[1] The Supreme Court of the United States has held to the doctrine that grants of power to municipal corporations to subscribe for stock in railways should be construed strictly and not be extended beyond the terms of the statute; and as there is no power in a municipal corporation to become a stockholder in a railroad corporation unless expressly conferred by the legislature, the power to issue negotiable bonds to pay such a subscription must be expressly, or by reasonable implication, conferred by statute.[2] Neither is the issuing of negotiable bonds authorized by a grant to a municipal corporation of power to appropriate moneys in aid of construction of a railroad, directing levy and collections of taxes to meet such appropriation, and prescribing no other mode of payment.[3] Considering the difference of opinion existing in these two jurisdictions upon this question, it seems that it would be well for the legislature hereafter in granting powers to municipal corporations to aid in the construction of public works by subscription to the stock of the corporations organized for the purpose, to expressly include the power to issue negotiable bonds for the payment of such subscriptions.

[1] Commonwealth ex rel. Reinboth *v.* Councils of Pittsburgh, (1861) 41 Pa. St. 278.

[2] Kelley *v.* Milan, 127 U. S. 139, affirming Kelley *v.* Town of Milan, 21 Fed. Rep. 842; Norton *v.* Dyersburg, 127 U. S. 160; Young *v.* Clarendon, 132 U. S. 340; Hill *v.* Memphis, 134 U. S. 198.

[3] Concord *v.* Robinson, 121 U. S. 165. See, also, Scott's Exrs. *v.* Shreveport, 20 Fed. Rep. 714; Katzenberger *v.* City of Aberdeen, 16 Fed. Rep. 745; Board of Comrs. of Delaware County *v.* McClintock, Auditor, (1875) 51 Ind. 325; La Fayette, M. & B. R. R. Co. *v.* Geiger, 34 Ind. 185; Harney *v.* Indianapolis, C. & D. R. R. Co., 32 Ind. 244.

§ 12. Notes or warrants to cover funds to be set aside in future taxation.— The Supreme Court of Louisiana has held that the police juries, the governing boards of the parishes in that state, have the undoubted authority to construct bridges, repair the same and to open roads and to keep the same in order. But they have no power to contract an indebtedness for this purpose in advance and to issue promissory notes or warrants to cover funds which may be set aside for this purpose in future taxation without express authority from the supreme political power of the state.[1]

§ 13. The issue of scrip.— Under a statute authorizing the city council to issue scrip to a certain amount, bearing interest at a rate not exceeding six per cent per annum, and providing that the statute should be void unless approved by a majority of the voters of the city present and voting at meetings held on a certain day, the council issued and sold scrip with principal and interest payable in coin. A statute enacted afterwards authorized the city to contract for the payment in coin of the principal and interest of this scrip and ratified all acts of the city or any officer in the matter of making payment in coin of this scrip, not providing for any new submission of the matter to the voters of the city. The issue of the scrip as it had been issued payable in coin was held to be legal.[2] And a city authorized, for the pur-

[1] Snelling *v.* Joffrion, President Police Jury, (1890) 42 La. Ann. 886; s. c., 8 So. Rep. 609, in which case the court affirmed the judgment in favor of the taxpayers who brought the action to annul the ordinance of the police jury authorizing the giving of ten notes of equal amounts payable one in each of the ten years to come from the date, to a bridge company which had contracted to build the bridge. The court said, however: "We do not mean to say that police juries cannot contract for improvements which they are authorized to make, to be paid out of the taxes which they are authorized to levy for parochial expenses, and which are set apart for this special improvement, but they cannot issue any promissory note, draft or warrant in advance to cover this amount which may go into the treasury. It must be there before the warrant issues, unless by legislative authority they are authorized to issue the same in advance. Sterling *v.* Parish of West Feliciana, 26 La. Ann. 59."

[2] Foote *v.* City of Salem, (1867) 14 Allen, 87, Bigelow, Ch. J., said: "It was clearly competent for the legislature to grant such power and to give validity to contracts into which the city had entered without the requisite legislative authority. No legal or constitutional right, either public or private, was violated by such enactment."

pose of defraying the expense of a public work, to issue scrip may lawfully issue the same all at once, and invest the money not required for immediate use upon the work in United States securities.[1] The issue of change bills or promises in the similitude of currency are prohibited in Georgia by statute, and no recovery can be had upon such change bills issued by a city.[2]

§ 14. **Purchase of real estate for erection of public buildings on time.**— The statutes of Indiana[3] conferring on cities the general power, with restrictions, to purchase real estate, for the purpose of constructing public buildings thereon, by implication, gives the exclusive right to determine the expediency of the purchase, the power to purchase on credit and to issue negotiable bonds of the city for the purchase money.[4] And the purchase of real estate by a city for construction of public buildings thereon on a credit of ten years is not a loan within the meaning of the Indiana statute,[5] prescribing that "loans may be made by a vote of two-thirds of the council, in anticipation of the revenue of the current and following year, and payable within that period; but the aggregate amount of such loan in any fiscal year shall not exceed the levy and tax authorized by this act for municipal expenses," and is not prohibited by that statute.[6]

[1] Foote *v.* City of Salem, (1867) 14 Allen, 87.

[2] Cothran *v.* City of Rome, 77 Ga. 582.

[3] Ind. R. S. 1881, § 3106, clause 4.

[4] City of Richmond *v.* McGirr, (1881) 78 Ind. 192. That courts cannot interfere with the exercise by governing authorities of their discretion in such matters, as a general rule, see Kelley *v.* City of Milwaukee, 18 Wis. 83; Baker *v.* Boston, 12 Pick. 184; Ex parte Fay, 15 Pick. 243; Parks *v.* Boston, 8 Pick. 218; Benjamin *v.* Wheeler, 8 Gray, 409; Evansville, etc., R. R. Co. *v.* City of Evansville, 15 Ind. 395; Macy *v.* City of Indianapolis, 17 Ind. 267; City of Greencastle *v.* Hazelett, 23 Ind. 186; Brinkmeyer *v.* City of Evansville, 29 Ind. 187.

[5] Ind. R. S. 1881, § 3159.

[6] City of Richmond *v.* McGirr, (1881) 78 Ind. 192. As to the distinction between a transaction like this and borrowing money, the court referred to Gelpcke *v.* City of Dubuque, 1 Wall. 175, 221, where it was held that the execution of bonds to pay an existing indebtedness of the city was not within the prohibition of the charter against the borrowing of money, and distinguished Mayor, etc., of Baltimore *v.* Gill, 31 Md. 375, and Jonas *v.* City of Cincinnati, 18 Ohio, 318. There was a limitation in the charter of this city upon the borrowing of money, but no restriction upon the creation of indebtedness. The court said: "The charter expressly grants to the council the power to purchase the real estate; * * * and in the absence of any statutory mode being pointed out for the exercise of such power, it may contract with reference to such power as a natural person; and such power is implied from the general unlimited

§ 15. **Erection of town buildings.**— As incident to its power to build a town house, a town has a right, in its discretion, to make additional compensation to a person for labor done by him in building it as a contractor under another person with whom the town had contracted to build it for a fixed sum.[1] The Massachusetts statute authorizing towns and cities to establish public libraries and in so doing to "appropriate money for suitable buildings or rooms" and for "the foundation of a library a sum not exceeding one dollar for each of its votable polls" has been construed, and the court determined that the words "not exceeding" did not necessarily qualify and limit the entire first clause; that on the contrary they were intended to restrict the latter provision with which they were immediately connected; that the intention of the legislature was to put a precise limit on the sum to be expended for books, and not on that to be appropriated for buildings or rooms.[2]

power granted. This rule, we think, arises from the necessity of the case, and is in harmony with the general rule of the law as established by the authorities. Citing Ketchum *v.* City of Buffalo, 14 N. Y. 356; Brady *v.* Mayor, etc., Brooklyn, 1 Barb. 584; Halstead *v.* Mayor, etc., New York, 5 Barb. 218; Mott *v.* Hicks, 1 Cow. 513; Moss *v.* Oakley, 2 Hill, 265; Kelley *v.* Mayor, etc., Brooklyn, 4 Hill, 263; Field on Corp. § 271; City of Galena *v.* Corwith, 48 Ill. 423; City of Williamsport *v.* Commonwealth, 84 Pa. St. 487; City of Lafayette *v.* Cox, 5 Ind. 38; Hardy *v.* Merriweather, 14 Ind. 203; Daily *v.* City of Columbus, 49 Ind. 169; Kyle *v.* Malin, 8 Ind. 34; Dill. on Mun. Corp. § 55, note 1, and §§ 81–85. As to the kind and form of evidences and obligations to be executed in such contracts by the authorities, see Sheffield School T'p *v.* Andress, 56 Ind. 157; School Town of Monticello *v.* Kendall, 72 Ind. 91; Bicknell *v.* Widner School T'p, 73 Ind. 501.

[1] Friend *v.* Gilbert, (1871) 108 Mass. 408, Morton, J., said: "The power of towns to raise and appropriate money is derived wholly from statutes. The statutes do not attempt to enumerate all the purposes for which money may be raised, but after specifying some of the more prominent ones provide that towns may grant and vote such sums as may be required 'for all other necessary charges arising therein.' Gen. St. Mass. chap. 18, § 10. It is under this general provision that towns have the power to vote money for the erection of town houses. Stetson *v.* Kempton, 13 Mass. 272. The right to build carries with it by implication the power to make contracts, to waive or alter them and to make arrangements for the payment of those who furnish labor and materials."

[2] Dearborn *v.* Brookline, (1867) 97 Mass. 466. In Inhabitants of Westbrook *v.* Inhabitants of Deering, (1874) 63 Me. 231, the words "necessary charges" in the statute as to the powers of towns to incur expense received a full discussion from the court in these words: "The construction of this clause came before this

§ 16. Purchase of sites for, erection of, and the repairs of school buildings.— The school trustees of an incorporated town, under the general law of Indiana, having filed with the board of trustees of such town a verified report, showing that they have contracted for the purchase of real estate on which to erect school buildings, and showing the amount of the debt incurred for such realty, and other estimated cost of the buildings, and asking the issue of bonds, the board of trustees under the statute relating to such bodies may, by ordinance, authorize the issue and sale of the bonds of the town equal in amount to the cost of the real estate and the estimated cost of the projected school buildings, not

court three years after the separation in Bussey *v.* Gilmore, 3 Me. 191, by which a tax for the discharge of a contract between a town and a toll bridge corporation for the free passage of the bridge by the citizens of the town was held illegal upon the ground that the power to raise money for 'necessary charges' extends only to those expenses which are incident to the discharge of corporate duties." WESTON, J., says: "The construction of the statutes in relation to the authority of towns to raise, assess and collect money is so clearly stated and so fully illustrated in Stetson *v.* Kempton, 13 Mass. 272, that we have little occasion to say more than that we are entirely satisfied with the principles of that case and the deductions there drawn. The court remark that 'it is important that it should be known that the power of the majority over the property and even the persons of the minority is limited by law to such cases as are clearly provided for and defined by the statute which describes the powers of these corporations.' By that decision this principle did become known; and believing that it is justified, as well from considerations of public policy as from a sound construction of the law, we have no disposition to modify or change it if we had the power to do so, which we clearly have not. * * * The generality of this phrase has received in the case above referred to a reasonable limitation. Without enumerating the objects which this term may be understood to embrace, it may in general be considered as extending to such expenses as are clearly incident to the execution of the power granted or which necessarily arise in the fulfilment of the duties imposed by law." The Maine Supreme Court of Judicature in 1863 in answer to questions submitted by the governor said: "The words 'other necessary town charges' do not constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever, at the will and pleasure of the majority. They embrace only all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by statute. While towns may raise money to discharge all liabilities in the performance of their multiplied duties, they cannot (unless new powers are conferred, or an excess of power receives a subsequent legal ratification) transcend their authority and incur expenses in no way arising in its exercise." Opinion of the Justices, 52 Me. 595, 598.

exceeding a limit specified in the statute.[1] The general power given a common council of a city by its charter to purchase land for the necessary purposes of the corporation, would be qualified by another provision that the board of education shall have power, with the consent of the common council, to buy sites for schoolhouses in such city, and a valid purchase of a site for a schoolhouse could be made only by the concurrent action of the two bodies.[2] And these two bodies cannot delegate the power of purchasing a schoolhouse site to a board of commissioners of such city without an express grant from the legislature of authority to do so.[3] A tax for the erection of a new schoolhouse may be voted by the electors of a school district before any site for the house has been selected.[4] And the electors of such a district have been held to have been warranted in voting a tax for the erection of a new schoolhouse at the center of the district in a case where the district, two miles wide from east to west, had one schoolhouse situated one-half mile east of the center, which was about thirty years old, but in reasonably good condition, yet too remote for some of the children of the district to attend school.[5] Under the constitutional limitation of Indiana upon municipal corporations, a town cannot issue bonds to obtain funds with which to rebuild a schoolhouse, should the issuance of the bonds create a debt in excess of two per centum of the taxable value of the property within the limits of the town.[6] Petitions from property owners are not necessary to authorize the board of trustees of incorporated towns in Indiana to issue bonds or procure money with which to build schoolhouses.[7]

§ 17. **The same subject continued.**—A statute conferring express authority upon a municipal corporation "to aid in the

[1] Williams *v.* Town of Albion, (1877) 58 Ind. 329.

[2] Lauenstein *v.* City of Fond du Lac, (1871) 28 Wis. 336.

[3] Ibid

[4] Seaman *v.* Baughman, (1891) 82 Iowa, 216; s. c., 47 N. W. Rep. 1091.

[5] Ibid.

[6] Town of Winamac *v.* Huddleston, (1882) 132 Ind. 217; s. c., 31 N. E. Rep. 561. The court said: "The debt created by a bond executed by a public corporation is not an obligation payable out of specific funds, but is a contract to pay money generally, and hence this case is not within the doctrine of such cases as Quill *v.* City of Indianapolis, 124 Ind. 292; s. c., 23 N. E. Rep. 788; Strieb *v.* Cox, 111 Ind. 299; s. c., 12 N. E. Rep. 481; and Board, etc., *v.* Hill, 115 Ind. 316; s. c., 16 N. E. Rep. 156.

[7] Clark *v.* Town of Noblesville, (1873) 44 Ind. 83.

building up of such schools and institutions of learning as they may think proper," clearly implies the power to build a house for that purpose.[1] Unless there is something in the charter of a municipal corporation, such as a city or town, which forbids it, such a corporation, without express authority, may incur liability for the building of a school house, it being clearly within the scope of the general power of such corporations.[2] The application of corporate funds, or creating a corporate debt, for the purchase of the interest in a building to be used as a public school or college for the accommodation of the people of a town is within the purposes and scope of the corporation.[3] And should it appear that the enterprise is not for any private gain, and that a board of trustees not elected by the municipal corporation contract to keep up in the building a public school, the fact that the superintendence of the school is left in the hands of such trustees would not render the appropriation of the corporate funds or the debt created illegal.[4] The charter of a board of public schools in Missouri gave the board power "to purchase, receive and hold property real and personal; to lease, sell or dispose of the same, *and do all other acts as natural persons*," and also "generally to do all lawful acts which may be proper and convenient to carry into effect the objects of the corporation." These provisions, taken in connection with the whole charter, have been construed not to authorize the board to create a debt for building a school house and to issue bonds to pay the debt.[5] Besides the provision in the charter of the board authorizing it to make an annual estimate of the amount of money to be raised for the purpose of building, repairing and furnishing school houses and requiring the County Court to cause the same to be levied and collected upon all taxable property in the school district was a limitation upon the power of the board regarding the building of school houses, and did not authorize the board to create a debt for that purpose and issue bonds for the payment of the debt.[6]

[1] Mayor, etc., of Cartersville *v.* Baker, (1884) 73 Ga. 686.

[2] Ibid; citing Frederick *v.* City Council of Augusta (1848) 5 Ga. 561; Danielly *v.* Cabaniss, (1874) 52 Ga. 211.

[3] Danielly *v.* Cabaniss, (1874) 52 Ga. 211.

[4] Ibid.

[5] Erwin *v.* St. Joseph Board of Public Schools, (1880) 2 McCrary, 608.

[6] Ibid; approving the reasoning in Gause *v.* Clarksville, 19 Alb. L. J. 253.

§ 18. **Purchasing on credit.**—The trustees of towns in Indiana being prohibited by statute from borrowing money or contracting a debt except upon the petition of five-eighths of the citizen taxpayers of the town, in the absence of such a petition cannot purchase cemetery grounds on credit.[1]

§ 19. **Building and repair of bridges and roads.**—Where the statute not only authorizes the supervisors of a township to repair the roads and build the bridges, but makes it their imperative duty to do so, and subjects them to fine and imprisonment for neglecting to keep the roads and bridges in a safe and passable condition, money is a necessary means to execute this power and perform this duty, and where it can only be obtained by borrowing it the power to do so is necessarily implied and passes as an incident to the execution of the general powers given and the performance of the duties required.[2] An incorporated town charged with the control of its streets and the duty to improve them may legitimately contract for the construction of free bridges over a stream dividing its streets, and by an issue of warrants or bonds raise the money necessary for the purpose.[3] But a municipal corporation cannot erect a toll bridge unless expressly authorized by law; nor has it power to lend its credit or make its accommodation paper for the benefit of citizens to enable them

[1] Pratt *v.* Luther, (1873) 45 Ind. 250. See Ketchum *v.* City of Buffalo, 14 N. Y. 356, holding that if the charter of the city or the general law of the state did not forbid the purchase of ground for a market place to be made on credit the city could purchase such grounds on credit. The court said: "A municipal corporation, therefore, may at common law, unless restrained by some statute, purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically conferred," etc. And afterwards: "I think it must be conceded that the city had power to purchase ground for a public market. If so there is nothing in the charter or general law of the state forbidding the purchase to be made on credit."

[2] Maneval *v.* Jackson Township, (1889) 9 Pa. Co. Ct. Rep. 28. The court distinguished Union Township *v.* Gibboney, 94 Pa. St. 534, and Gibson *v.* Poor District, 122 Pa. St. 557. In Mills *v.* Gleason, 11 Wis. 470, the Wisconsin Supreme Court held that "where the charter of a municipal corporation confers the power to purchase fire apparatus, cemetery grounds, to establish markets and to do many other things for the execution of which money would be a necessary means, it also, in the absence of any positive restriction, confers the power to borrow money as an incident to the execution of these general powers."

[3] Mullarky *v.* Town of Cedar Falls, (1865) 19 Iowa, 21.

to execute private enterprises.[1] Authority being given by a charter of a city to its common council "to appropriate in any one year, over and above the ordinary expenses needed on the bridges in said city, an expenditure not to exceed ten thousand dollars, for the building of a new bridge in said city, or for any extraordinary repairs on any bridge, and for the payment of the same in whole or in part," and the charter declaring further that "the council, instead of collecting the same in the next tax roll, may issue its bonds," etc., these provisions would not prevent the council letting by a single contract the work of constructing a bridge at a greater price than $10,000. The provisions merely limit the amount to be raised by taxation, or the amount of the bonds to be issued, in any one year to pay for such work.[2] A statute authorizing two of the counties of Alabama to erect a bridge, which might be either a free foot and wagon bridge for the traveling public, or a railroad bridge, or both combined, has been held to contravene the constitutional provision which denies to the legislature power to authorize any county to lend its credit or to grant public money or a thing of value in aid of or to any individual, association or corporation.[3] The governing authorities of a county, having, under authority from the legislature, purchased certain bridges from private parties, and changed them from toll to free bridges, upon their being destroyed by freshets, or otherwise, may rebuild them.[4]

§ 20. **Incurring liability under California statutes.**— The power to levy and collect a tax in the charter of a city "for any object whatever within the provision of the corporate powers before given," will not authorize the levy and collection of a tax for making a survey of a railroad route from the city to another.[5] The power granted to a city to take stock "in any public improvement, or effect a loan for any purpose," upon obtaining the con-

[1] Clark *v.* City of Des Moines, (1865) 19 Iowa, 199.

[2] Howard *v.* City of Oshkosh, (1873) 33 Wis. 309.

[3] Garland *v.* Board of Revenue, 87 Ala. 223; s. c., 6 So. Rep. 402.

[4] Elliott *v.* Gammon, (1886) 76 Ga. 766. See Washer *v.* Bullitt County, (1884) 110 U. S. 558, involving the question of the power of a county in Kentucky to build a bridge at its own cost across a boundary creek, one end of the bridge extending into the territory of another county, in which the Supreme Court of the United States construed the Kentucky statutes relating thereto.

[5] Douglass *v.* Mayor and Common Council of Placerville, (1861) 18 Cal. 643.

sent of the people at an election held for the purpose cannot be extended to improvements other than municipal in their character. Under such a power, for instance, a city cannot subscribe to stock in a navigation company.[1]

§ 21. **Incurring liability under Indiana statutes.**— The board of commissioners of a county in Indiana, under their power "to make all orders respecting the property of the county * * * and to take care of and preserve such property," may contract for insurance upon the public buildings of the county.[2] While at the time of the passing of an order by an Indiana board of county commissioners, making a donation for the purpose of securing the location of an agricultural college within their jurisdiction and making an appropriation to pay the same, the Supreme Court of that state held that the order was not void, but was capable of ratification by the legislature. And this order was ratified and rendered valid by subsequent legislation accepting the donation and locating the college in that county. And the law authorizing a collection by taxes of the amount donated for this purpose was not objectionable as being local or special when a general law could have been made applicable.[3] There is no power in an Indiana board of county commissioners to furnish aid to a gravel road or turnpike company in building or repairing its road at the expense of the county, neither can they enter into a contract with such companies for the future repairs of a bridge or the approaches to such bridge on the line of its road.[4] Such a board cannot make a contract

[1] Low *v.* Mayor and Common Council of Marysville, (1855) 5 Cal. 214. The court said: "The words 'public improvements' when applied to a municipal government must be taken in a limited sense as applying to those improvements which are the proper subject of police and municipal regulation — such as gas, water, almshouses, hospitals, etc.— and cannot be extended to subjects foreign to the object of the incorporation and beyond its territorial limits. Without referring to the many privileges exercised by the free cities of Europe, some of which exercised almost all the power of sovereignty by virtue of royal patent or their own usurpation, we understand the powers of municipal corporations to be limited, particularly in the United States, to the express grant of their charters, the object of their creation to be governmental and not commercial."

[2] Potts *v.* Bennett, (Ind. 1895) 39 N. E. Rep. 518.

[3] Marks, Treasurer of Tippecanoe County *v.* Trustees of Purdue University, (1871) 37 Ind. 155; see Cash *v.* Auditor of Clark County, 7 Ind. 227; Stocking *v.* The State, 7 Ind. 326.

[4] Driftwood Valley Turnpike Co. *v.* Board of Comrs. of Bartholomew County, (1880) 72 Ind. 226.

conditionally to pay certain expenses of boring wells for oil and digging for minerals.[1] Neither can it appropriate the funds of the county to the payment of the debts of a county agricultural joint-stock company or to the building of schoolhouses.[2] It is not, under the Indiana laws regulating the incorporation of cities, etc., within the power of a city council to contract to pay its marshal any sum of money for the performance of any duties outside of his official duties.[3]

§ 22. **Incurring liabilities under Kansas statutes.**— The grant of power by the Kansas statutes to townships to issue bonds "to aid in the construction of railroads or water power by donation thereto, or the taking stock therein or for other works of internal improvement" includes authority to assist in the construction of depots and sidewalks of a railroad.[4] A statute authorizing a municipal corporation to issue bonds which can only be paid by taxation, for the benefit of a manufacturing enterprise of private persons has been held to be void as violating the fundamental rights of property, the purpose being essentially private in its nature, though the public may be incidentally benefited.[5] In the same federal court municipal bonds issued under legislative authority to be paid by taxation as a bonus or donation to secure the location, or aid in the erection of a manufactory or foundry owned by private individuals were held to be void even in the hands of holders for value.[6] County commissioners in Kansas may employ counsel to take charge of litigation on behalf of the county where the county is interested in the result of the action, either in its own behalf, or in that of some township of the county, where the suit is brought against the representatives of the county, and is beyond the limits of the county.[7] Though made their duty, unless the charter of municipal corporations expressly permits it, they cannot levy a tax for the erection of schoolhouses.[8] A trustee of a town in Kansas

[1] Burnett *v.* Abbott, 51 Ind. 254.

[2] Warren County Agricultural Joint Stock Co. *v.* Barr, 55 Ind. 30; Rothrock *v.* Carr, 55 Ind. 334.

[3] City of Brazil *v.* McBride, (1879) 69 Ind. 244.

[4] Township of Rock Creek *v.* Strong, (1877) 96 U. S. 271.

[5] Citizens' Savings Association *v.* Topeka, (1874) 3 Dill. 376.

[6] Commercial National Bank *v.* Iola, (1873) 2 Dill. 353.

[7] Thacher *v.* Jefferson County, 13 Kans. 182.

[8] Leavenworth *v.* Norton, 1 Kans. 432.

has no power to bind the county by a contract with a physician for treatment of persons sick with smallpox. The power to do so is alone in the commissioners of the county.[1] Neither is a county in Kansas bound to pay a physician for medical services rendered by him in attending on prisoners confined in the county jail, except when authorized by the county commissioners.[2]

§ 23. **For lighting the streets of a city.**— The contention in an Indiana case was that to regulate the lighting of the streets of a city is a legislative power which cannot be delegated away, surrendered or restricted by contracts or otherwise, and that, therefore, the contract made by the city authorities with a gas company for lighting its streets for a term of years was a restriction upon that legislative power, and, therefore, invalid. The Supreme Court of the state held the contract binding upon the city, and enforceable in the same manner as the contract of a person or a business corporation; also, that it could not be repealed, impaired or changed by the city by ordinance or otherwise.[3]

[1] Smith *v.* Shawnee County, 21 Kans. 669.

[2] Roberts *v.* Pottawatomie County, 10 Kans. 29.

[3] City of Indianapolis *v.* Indianapolis Gas Light & Coke Co., (1879) 66 Ind. 396. As to the power to contract, it was said by BIDDLE, J., speaking for the court: "No corporation can construct unless the power is granted by law. This power is generally granted to business corporations, as for banking, manufacturing, shipping; and such corporations generally have no legislative or governmental powers, except the power to make by-laws for their own government; they cannot pass ordinances for the government of others. Municipal corporations, besides the power to contract, which is generally granted to them within certain limits, have legislative or governmental powers by which they make by-laws to govern themselves and pass ordinances to govern others, or the citizens of a town or city within their geographical limits. This power to legislate within the authority delegated to them by law is distinct from the power to contract, although exercised by the same corporation. They cannot, by contract, delegate or restrict their legislative power, nor can they, merely by their legislative power, make a contract. These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate, while it is impossible to make a contract without the consent of another, or others. We think, therefore, that when [this city] made the contract in question with the gas light company it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy within the limits of its franchise." The court commented

§ 24. **Contract on time for lighting streets.**— A municipal corporation may contract on time with a gas or other lighting company for a supply of gas or light for several years, as it would not be the contracting of a debt within the scope of section 2448 of the Revised Statutes of Louisiana, which provides that the "police juries of the several parishes and other constituted authorities of incorporated towns and cities in this state shall not hereafter have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt as contracted."[1] The

upon Roll *v.* City of Indianapolis, 52 Ind. 547, and distinguished Rittenhouse *v.* Mayor & City Council of Baltimore, 25 Md. 336; Gale *v.* Village of Kalamazoo, 23 Mich. 344, and City of Oakland *v.* Carpentier, 13 Cal. 540. They considered their views to be sustained by the main consent of the following authorities: Evansville, Ind. & Cleveland Straight Line R. R. Co. *v.* City of Evansville, 15 Ind. 395; Nelson *v.* City of La Porte, 33 Ind. 258; City of Indianapolis *v.* Bly, 39 Ind. 373; City of Crawfordsville *v.* Hays, 42 Ind. 200; State Board of Agriculture *v.* Citizens' St. Ry. Co., 47 Ind. 407; Board of Comrs. of Tippecanoe County *v.* Everett, 51 Ind. 543; San Francisco Gas Co. *v.* City of San Francisco, 9 Cal. 453; Roll *v.* City of Indianapolis, 52 Ind 547; Davenport *v.* Inhabitants of Hallowell, 10 Me. 317; Bailey *v.* Mayor, etc., City of New York, 3 Hill, 531; Masterton *v.* Mayor, etc., City of Brooklyn, 7 Hill, 61; Milhau *v.* Sharp, 27 N. Y. 611; Richmond County Gas Light Co. *v.* Town of Middletown, 59 N. Y. 228; Devlin *v.* Mayor, etc., City of New York, 63 N. Y. 8; Mayor & Council of Rome *v.* Cabot, 28 Ga. 50; Intendant & Town Council of Livingston *v.* Pippin, 31 Ala. 542; State of New York *v.* Mayor, etc., City of New York, 3 Duer, 119; Britton *v.* Mayor, etc., New York, 21 How. Pr. 251; Louisville City Ry. Co. *v.* City of Louisville, 8 Bush, 415; Harlem Gas Light Co. *v.* Mayor, etc., New York, 33 N. Y. 309; Illinois & St. Louis R. R. & Canal Co. *v.* City of St. Louis & Pacific Elevator Co., 2 Dill. 70; State of Ohio *v.* Cincinnati Gas Light & Coke Co., 18 Ohio St. 262; Gall *v.* City of Cincinnati, 18 Ohio St. 563; Minturn *v.* Larue, 23 How. 435; Memphis City *v.* Dean, 8 Wall. 64; Chicago *v.* Sheldon, 9 Wall. 50; Hitchcock *v.* Galveston, 96 U. S. 341; Edwards *v.* Kearzey, 96 U. S. 595; People *v.* Common Council of Detroit, 28 Mich. 228; Mayor, etc., of Jackson *v.* Bowman, 39 Miss. 671; Davenport Gas Light & Coke Co. *v.* City of Davenport, 13 Iowa, 229; State of Wisconsin *v.* Milwaukee Gas Light Co., 29 Wis. 454; Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; Western Saving-Fund Society of Philadelphia *v.* City of Philadelphia, 31 Pa. St. 175; Philadelphia *v.* Fox, 64 Pa. St. 169.

[1] New Orleans Gas Light Co. *v.* City of New Orleans, (1890) 42 La. Ann. 188; s. c., 7 So. Rep. 559. The court said: "There is no stipulation or expression, either in the contract or ordinance, on which to ground the contention that the city thereby intended to contract a debt. The agreement imparts no absolute and binding obligations on the part of the city to pay any sum of money for a consideration pre-existing or executed on the part of the obligee which is of the essence of a

court held further that in the absence of a special statutory limitation or restriction the power given to the city to make contracts for lighting its streets, landings, etc., was sufficient to authorize a contract for more than one year for such commodity.[1]

§ 25. **Caring for the indigent, etc.**— There is inherent in every municipal corporation the power to relieve sick persons indigent in their circumstances, especially in times of epidemic diseases, and to provide for poor persons who are unable to labor.[2] A city with power delegated to it to provide for foundlings, the insane, the indigent, infirm and helpless, and for the correction of the vicious and vagrant portions of its population, if it has not provided for such persons, or if they can be better cared for and trained in other institutions than in those of the city, may contract for such care and training by such other institutions. But the exercise of the power of making such contracts must be with the limitation that the subject-matter of the contract be kept within the power and control of municipal authority, and that complete accountability be provided for, and thus make the institution contracted with, *pro hac vice*, municipal officers.[3]

debt. The obligation of the city for future disbursements in favor of the company is conditioned on the performance on the part of the latter of its part of the contract, a fact to be ascertained under the terms of the contract itself from month to month. Although the eventual disbursements to be made by the city may amount to several hundred thousand dollars, it is certainly not correct to argue that the effect of the contract was to place it in debt to that amount. If under the terms of the contract the company furnishes and operates in quality and quantity the lights contemplated and agreed upon, and if payments are made therefor by the city from month to month, as stipulated in the contract, the city would certainly never be in debt to the company. Hence we conclude that no indebtedness was contemplated to flow from or was created by the contract." On authority of Weston *v.* Syracuse, 17 N. Y. 110; City of Valparaiso *v.* Gardner, 97 Ind. 1; s. c., 7 Am. & Eng. Corp. Cas. 626.

[1] New Orleans Gas Light Co. *v.* City of New Orleans, (1890) 42 La. Ann. 188; s. c., 7 So. Rep. 559; citing in support of the ruling City of Indianapolis *v.* Indianapolis Gas Light Co., 66 Ind. 396; Weston *v.* Syracuse, 17 N. Y. 110; City of Valparaiso *v.* Gardner, 97 Ind. 1; Atlantic Water Works *v.* Atlantic City, 15 Am. & Eng. Corp. Cas. 327.

[2] Vionet *v.* Municipality No. 1, 4 La. Ann. 42.

[3] St. Mary's Industrial School for Boys *v.* Brown, (1876) 45 Md. 310. It was said by the court: "The authority (to provide for such persons) that is held and exercised in this behalf is a trust, as well for those who become the objects of it, as those who support it by contribution in the form of taxes levied upon their property, and being an important public trust it cannot be delegated beyond the power and discretion of those to whom it is confided."

§ 26. Employment of physicians for the poor — Indiana statute construed.— The Indiana statute[1] makes it the duty of the board of commissioners of a county "to contract with one or more skillful physicians, having knowledge of surgery, to attend upon all persons confined in jail, or paupers in the county asylum, and may also contract with physicians to attend upon the poor generally in the county. * * * Provided that this section shall not be so construed as to prevent the overseers of the poor, or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his or their jurisdiction may require." The Supreme Court has held that a county is not liable to a physician for medical services rendered by him to a poor person, when the physicians employed by the board of county commissioners to attend the poor, as required by this statute, refused to act, and when the town trustee, who by statute is the overseer of the poor, declined to employ this physician.[2]

§ 27. Expenses connected with epidemic diseases.— The Supreme Court of Alabama has held that a contract by a city

[1] Ind. Rev. St. (1881) § 5764.

[2] Morgan County *v.* Seaton, (1889) 122 Ind. 521; s. c., 24 N. E. Rep. 213. The holding of the court has been uniform that the overseer of the poor, under this statute, has power to employ a physician only in the event the board of commissioners fail to make suitable provision for attendance upon the poor by contract. Board, etc., *v.* Boynton, 30 Ind. 359; Board, etc., *v.* Hon, 87 Ind. 356. But the overseer of the poor, in case the physician employed by the board is not accessible, and an emergency is deemed to exist, or if he refuses for any reason to act, may employ a physician in case of urgent necessity to treat one in need of medical aid, and, in the absence of fraud, the county will be bound by his judgment and liable for the medical services, notwithstanding the employment of a regular physician by the county. Board, etc., *v.* Seaton, 90 Ind. 158; Washburn *v.* Board, etc., 104 Ind. 321; s. c., 3 N. E. Rep. 757; see, also, Comrs., etc., *v.* Holman, 34 Ind. 256. As to the powers of town trustees under this statute, see Robbins *v.* Board of Comrs. of Morgan County, (1883) 91 Ind. 537. As to the terms, etc., of a contract with a physician under this statute, see Board of Comrs., etc., *v.* Ritter, (1883) 90 Ind. 362. As to the duty and power of a town trustee under Ind. Rev. St. (1881) § 6089, in providing for persons in need of temporary relief, see Board of Comrs., etc., *v.* Jennings, (1885) 104 Ind. 108; s. c., 3 N. E. Rep. 619. The mere fact that a board of commissioners employs physicians to attend the poor of a county will not operate as a limitation upon the power of a township trustee as overseer of the poor to employ others in case of emergency. Board of Comrs. of Perry County *v.* Lomax, (1892) 5 Ind. App. 567; s. c., 32 N. E. Rep. 800.

with a physician, entered into during the late war, to attend to indigent persons sick with the smallpox, whether belligerents or non-belligerents, was not such a contract as is forbidden by the law of the land or public policy.[1] A statute authorizing the board of supervisors of a city "to allow and order paid out of the general fund, not to exceed six thousand dollars for any one year, for the support of" a smallpox hospital, has been held in California not to authorize the board to purchase a site for a smallpox hospital.[2] Neither was the purchase of a site for the hospital authorized by the statute giving the board power to make all regulations which may be necessary or expedient for the prevention of contagious diseases, nor by the constitutional provision of the state authorizing a city to make all such police, sanitary and other regulations as are not in conflict with general laws.[3]

§ 28. For what towns may not be made liable.—A town has no authority to appropriate money for the payment of expenses incurred by individuals, prior to its corporate existence

[1] City of Selma *v.* Mullen, (1871) 46 Ala. 411; in this case, where it appeared that the usage of the city authorities was to have the city physician attend to smallpox cases for an extra compensation, and the city physician, plaintiff here, had been told by one of the aldermen in the presence of the others, no one objecting, to "go on, doctor, with your smallpox cases, and we will do what is just and right," it was held that the city was bound by an implied promise to pay him a reasonable value for his services in this respect. As to an action of assumpsit lying against corporations upon an express or implied promise, see Bank of Columbia *v.* Patterson, 7 Cranch, 299; Bank of U. S. *v.* Dandridge, 12 Wheat. 64; Danforth *v.* Schoharie & Duanesburgh Turnpike Road, 12 Johns. 227; Montgomery County *v.* Barber, 45 Ala. 237.

[2] Von Schmidt *v.* Widber, City Treasurer, (1894) 105 Cal. 151; s. c., 38 Pac. Rep. 683. The court said: "(Authority to make such a purchase) cannot be implied from the power conferred upon the board of supervisors by the statute. Aside from the fact that this statute makes no mention of real estate, or of any purchase thereof, its language limits the power to the expenditure of 'six thousand dollars for any one year,' and the money thus allowed to be expended is for the 'support' of the smallpox hospital — words which eminently refer to an existing hospital, rather than to one to be thereafter brought into existence. It is not to be inferred that when the legislature was thus careful in limiting the amount of money to be expended, and in the language in which it described the mode of its expenditure, it intended to confer an unlimited authority upon the board of supervisors to expend any amount of money that it might choose for the purchase of a site for the hospital for whose support it had thus provided."

[3] Von Schmidt *v.* Widber, City Treasurer, (1894) 105 Cal. 151; s. c., 38 Pac. Rep. 683 citing as authority for the last proposition, Ketchum *v.* City of Buffalo, 14 N. Y. 356.

as a town, in procuring the passage of its charter.[1] In the commonwealth of Massachusetts towns have no authority to expend money or pledge their credit to celebrate the anniversary of the surrender of Cornwallis.[2] Nor has it authority to appropriate money for the celebration of the Fourth of July.[3] By the statute of 1861 (Chap. 165) cities are now authorized in Massachusetts to appropriate money to celebrate a holiday, but such authority can be exercised only in pursuance of a "vote of two-thirds of the members of each branch of the city council present and voting by yea and nay vote.[4]

[1] Frost *v.* Belmont, (1863) 6 Allen, 152.

[2] Tash *v.* Adams, Treasurer, (1852) 10 Cush. 252.

[3] Hood *v.* Lynn, (1861) 1 Allen, 103. BIGELOW, Ch. J., said, after referring to the power of towns to raise money for "all other necessary charges": The appropriation is neither necessary to the exercise of any power expressly granted to the city; nor is it incidental to any right or authority, which, though not expressly granted, has its origin in well-settled usage and is founded upon the necessities, convenience, or even the comfort of the inhabitants. This is the extreme limit of the power of towns and cities to grant money as settled by repeated adjudications of this court. Stetson *v.* Kempton, 13 Mass. 272; Parsons *v.* Goshen, 11 Pick. 396; Willard *v.* Newburyport, 12 Pick. 227; Allen *v.* Taunton, 19 Pick. 485; Spaulding *v.* Lowell, 23 Pick. 71; Anthony *v.* Adams, 1 Metc. 284. See, also, Gerry *v.* Stoneham, (1861) 1 Allen, 319. In New London *v.* Brainard, 22 Conn. 553, an appropriation which had been voted by the city for the celebration of Independence Day was held to have been properly enjoined as beyond the power of the city under its charter and the laws generally. As to the power of a city under the power given in its charter to raise and expend moneys "to defray the contingent and other expenses of the city" to provide an entertainment for its citizens at the expense of the city, see Hodges *v.* Buffalo, 2 Den. 110; New London *v.* Brainard, 22 Conn. 553.

[4] Morrison, Admx., *v.* Lawrence, (1867) 98 Mass. 219. In Morton *v.* City of Nevada, 41 Fed. Rep. 582, bonds issued by the city for the purchase of a right of way and depot grounds for a railroad were held to be void as violating the constitutional provision of Missouri declaring that the general assembly shall not authorize any city to loan its credit to any corporation unless two-thirds of the qualified voters assented thereto. It was further held that the purchaser of these bonds could not maintain an action against the city for money paid and received to recover the amount paid the city for the bonds, as the city having no power to create the debt, no implied promise could arise for its payment, notwithstanding the general statute of Missouri, which gives the board of trustees power "to borrow money for the improvement" of the town, the purchase of highway and depot grounds for the railroad not being for the improvement of the town, but a debt incurred for the benefit of the railroad corporation without the proper assent of voters.

§ 29. Expenses of a committee to secure legislation.—A town cannot raise by taxation or by pledge of its credit, or pay from its treasury, money for the expenses of a committee directed by a vote of the town to petition the legislature for the annexation of the town to another town.[1] Neither can it raise

[1] Minot *v.* West Roxbury, (1873) 112 Mass. 1. ENDICOTT, J., as to proper construction of the words "necessary charges," referred to the various Massachusetts cases previous to this one as follows: "The leading case is Stetson *v.* Kempton, 13 Mass. 272. The meaning of the word 'necessary' in the statute is discussed at length by Chief Justice PARKER, with a fulness of illustration in regard to the various expenses which may be said to fall within the words 'necessary charges,' that seem to exhaust the subject, and has not been materially enlarged by later decisions. He says: 'The phrase 'necessary charges' is indeed general; that the very generality of the expression shows that it must have a reasonable limitation. For none will suppose that under this form of expression every tax would be legal which the town should choose to sanction. The proper construction of the term must be that in addition to the money to be raised for the poor, schools, etc., towns might raise such sums as should be necessary to meet the ordinary expenses of the year, such as the payment of such municipal officers as they should be obliged to employ, the support and defense of such actions as they might be parties to, and the expenses they would incur in performing such duties as the laws imposed, as the erection of powder houses, providing ammunition, making and repairing highways and town roads, and other things of a like nature, which are necessary charges because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town houses to assemble in and market houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term *necessary*, for these may be essential to the comfort and convenience of the citizens. * * * With respect to the defense of any town against the incursions of an enemy in time of war, it is difficult to see any principle upon which that can become a necessary town charge. It is is not a corporate duty,' etc. In another case * * * Rumford School District *v.* Wood, 13 Mass. 193, the chief justice said of towns that they may be considered as *quasi* corporations, with limited powers co-extensive with the duties imposed on them by statute or usages. The rule of construction laid down in these early cases has been strictly followed in the later decisions. In Parsons *v.* Goshen, 11 Pick. 396, Mr. Justice WILDE says: 'The important question in this case is settled, and upon principles that cannot be controverted, in Stetson *v.* Kempton.' In Anthony *v.* Adams, 1 Metc. 284, Chief Justice SHAW said: 'It is now well settled that a town, in its corporate capacity, will not be bound, even by an express vote of a majority, to the performance of contracts or other legal duties not coming within the scope of the objects and purposes for which they are incorporated.' In Vincent *v.* Nantucket, 12 Cush. 103, it was said by Mr. Justice MERRICK: 'Their contracts will be valid when made in relation to objects concerning which they have a duty to perform, an interest to protect, or a right to defend.

by taxation, or pay from its treasury, money for expenses incurred in opposing before the legislature the annexation of the whole or a part of its territory to another town.[1] A Maine town cannot incur expenses in opposing before a legislative committee a division of its territorial limits.[2]

§ 30. **For the payment of bounties to volunteers.**— The Illinois Supreme Court sustained the constitutionality of a law authorizing the towns in certain counties therein named to levy a tax to pay bounties to persons who should thereafter enlist or be drafted in the army of the United States, a vote of the township being first taken. The courts defined a tax for "corporate purposes" to mean "a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it," and held that a tax levied by the town for the purpose of paying bounties to such as would volunteer in the army during the late war in order thereby to exempt the town from an impending draft on conscription might be fairly considered a tax for the common good and for a "corporate purpose." [3]

But here is the extent at once of their right and their power. They cannot engage in enterprises foreign to the purposes for which they were incorporated, nor assume responsibilities which involve undertakings not within the compass of their corporate powers.' Following this rule of construction, this court has held expenditures to be legal though not within the express terms of the statute, but incidental to and within the scope of a power of a town, as for the erection of market and town houses, and the construction of reservoirs to supply fire engines. Spaulding *v.* Lowell, 23 Pick. 71; French *v.* Quincy, 3 Allen, 9; Hardy *v.* Waltham, 3 Met. 163. For the support of a public clock, as within the jurisdiction of a town, in the same manner as hay scales, burying grounds, wells and reservoirs, being objects of convenience and necessity to the inhabitants. Willard *v.* Newburyport, 12 Pick. 227. A town may also indemnify its officers against liabilities incurred in the *bona fide* discharge of their official duties, as in regard to the reassessment of taxes, the repairs of a highway, the report of a school committee, the erection of a town house, all incidental to and connected with the exercise of the powers of a town (Nelson *v.* Milford, 7 Pick. 18; Bancroft *v.* Lynnfield, 18 Pick. 566; Fuller *v.* Groton, 11 Gray, 340; Hadsell *v.* Hancock, 3 Gray, 526; Babbitt *v.* Savoy, 3 Cush. 530), and may pay for professional services in the defense of suits, independent of the result of the suit, and whether the town acted legally or illegally in the matter in controversy, it being in the ordinary administration of town affairs. Cushing v. Stoughton, 6 Cush. 389."

[1] Coolidge *v.* Brookline, (1874) 114 Mass. 592.

[2] Inhabitants of Westbrook *v.* Inhabitants of Deering, (1874) 63 Me. 231.

[3] Taylor *v.* Thompson, (1866) 42 Ill. 9.

§ 31. Validating a contract of village trustees.— Under the statutes of New York there is required a submission of a proposition for furnishing a water supply to a vote of the electors before a contract can be made by the village trustees, if the cost is to exceed a certain sum. In case village trustees enter into a contract for this purpose, not authorized by this statute, and there is an attempt to ratify it by the electors of the village, the contract would not be validated as of the time when it was made, but simply rendered operative from and after the date of the vote.[1] And the statute as to submission to a vote of the electors of the matter in question was not modified by the subsequent statute providing for the submission "to the taxpaying electors," at a special election of the question of raising moneys for some proper village object additional to the amount already authorized, and for raising the same in like manner with other taxes, and authorizing the trustees to borrow such sum in emergency in anticipation of the tax, but granting them no authority to bond the village otherwise by contract.[2]

§ 32. Illustrations of liabilities incurred for a "corporate purpose."—The Illinois Supreme Court has held that where a tax was voted by a city to donate a sum of money in aid of normal school in case it should be located therein, and it was so located, and the

[1] Squire *v.* Preston, (1894) 82 Hun, 88; s. c., 31 N. Y. Supp. 174. The statute referred to is N. Y. Laws 1873, chap. 737, § 5, as amended by N. Y. Laws 1885, chap. 422.

[2] Squire *v.* Preston, (1894) 82 Hun, 88; s. c., 31 N. Y. Supp. 174. The later statute referred to is N. Y. Laws 1887, chap. 504; see, also, N. Y. Laws 1890, chap. 566, § 81, which re-enacts in substance the act of 1873. See In re Commissioners of Central Park, 50 N. Y. 493; In re Evergreens, 47 N. Y. 216. The questions involved in Squire *v.* Preston, *supra*, were considered also in Squire *v.* Cartwright, (1893) 67 Hun, 218; s. c., 22 N. Y. Supp. 899, the contract made by the village trustees with the water company being for the erection and supply of hydrants. As to the points involved, the court cited: Smith *v.* Cramer, 14 N. Y. Wkly. Dig. 107; Hassan *v.* City of Rochester, 67 N. Y. 528. As to ratification of the contracts by a vote the court considered applicable the language of Judge Denio in Peterson *v.* Mayor, etc., 17 N. Y. 449, 454, which was as follows: "No sort of ratification can make good an act without the scope of the corporate authority So where the charter, or a statute, binding upon the corporation, has committed a class of acts to particular officers or agents other than the general governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects."

bonds of the city were regularly issued and put in circulation to that amount, such debt was incurred for a "corporate purpose," within the meaning of the constitutional provision allowing taxation for "corporate purposes."[1] So, also, held as to a certain issue of the city's bonds under legislative authority and upon a vote of its legal voters, whereby the city was relieved from the payment of a larger amount of its prior indebtedness.[2] The city being also authorized by the statute to give bonds to aid in the establishment and foundation of a university, and for that purpose having purchased grounds and submitted to vote of the people the question of issuing a certain amount of bonds to make payment for the lands, and it being carried, these bonds were also held to be for a "corporate purpose," there appearing no fraud, combination or oppression in the transaction.[3] The constitutional provision of New York prohibiting cities from incurring indebtedness except for city purposes, does not deprive the city of the power to construct and operate a plant for a supply of electric light to the city and its inhabitants, as this is a corporate purpose within the meaning of the constitutional provision.[4] Should a municipal corporation issue negotiable certificates of indebtedness, for instance, to a contractor for the performance of work to be done, or done, for an authorized corporate purpose, without legal authority or power to issue such certificates, the payee may maintain an action for money had and received; and the fact that the payee was not a party to the contract would be immaterial if the certificates are issued to him at the request of the contractor and the money received by the city and paid over to the contractor.[5]

§ 33. Purchase of fire engines and apparatus.— A town possesses inherent power to purchase fire engines for the protection of the property of its citizens from fire.[6] The statute of

[1] Burr *v.* City of Carbondale, (1874) 76 Ill. 455.

[2] Ibid.

[3] Ibid. In support of these views the court cited Merrick *v.* Inhabitants of Amherst; 12 Allen, 500.

[4] Hequembourg *v.* City of Dunkirk, 49 Hun, 550; s. c., 2 N. Y. Supp. 447.

[5] Bangor Savings Bank *v.* City of Stillwater, (1892) 49 Fed. Rep. 721; Louisiana *v.* New Orleans, 102 U. S. 204; Chapman *v.* Douglas County, 107 U. S. 348; s. c., 2 Sup. Ct. Rep. 62; Hitchcock *v.* Galveston, 96 U. S. 341.

[6] Corporation of Bluffton *v.* Studabaker, (1885) 106 Ind. 129. The court said: "The power to purchase fire engines by an incorporated city or town does not, however, of necessity, depend upon the question whether the charter of such city or town has,

Indiana for incorporating towns gives them power in one section among other things "to provide all necessary apparatus for the extinguishment of fires." Under this section a town is authorized to purchase a fire engine for cash.[1] Another section gives towns power "to incur a debt, on proper petition from the taxpayers of the town severally. * * * " Under this section the town may incur a debt for the purchase of a fire engine and apparatus, or purchase it upon credit.[2] Another provision of this law requires the assent of five-eighths of the taxpaying citizens of the town before there is power in the town to borrow money or incur any debt or liability. Upon a proper petition the board of trustees in this case passed an ordinance for raising the money necessary to pay for an engine by sale of the bonds of the town. The court held that the board had the power to disregard this ordinance for an issue and sale of bonds. Their power to purchase an engine on a credit was not exhausted by the mere passage of the ordinance for the issue and sale of bonds. The engine might be purchased by parol and

or has not, expressly granted such power. In 1 Dill. on Mun. Corp. (3d ed.) § 143, the learned author says: "The prevention of damage by fire is usually an object within the scope of municipal authority, either by express grant or by the power, in a chartered town or city, to make police regulations or needful by-laws, and for this purpose it may regulate the mode and removal of ashes. And where the town or municipal body has such power, it is authorized to appropriate money for the purchase of engines, or for the repair thereof, if to be used for the purpose of extinguishing fires therein, and this, whether they belong to the corporation or were purchased by private subscription." So in Clark *v.* City of South Bend, 85 Ind. 276; s. c., 44 Am. Rep. 13, the court said: "A municipal corporation has such powers as are expressly granted and also such implied or incidental ones as are necessary to carry into effect the express powers and effectuate the object of the corporate existence. It was long ago declared that the power to prevent danger from fire is an incidental one, belonging to all municipal corporations." So, also, in Baumgartner *v.* Hasty, 100 Ind. 575; s. c., 50 Am. Rep. 830, the court said: "The rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire. * * * The exercise of such a power is not the exercise of a new power, nor of one not connected with the purposes for which public corporations are organized; on the contrary, it is the exercise of a power long possessed by municipal corporations and closely connected with the purposes for which such corporations are organized."

[1] Second National Bank of New Albany *v.* Town of Danville, (1878) 60 Ind. 504.

[2] Second National Bank of New Albany *v.* Town of Danville, (1878) 60 Ind. 504.

in this case on credit, and notes commercial or otherwise might be executed for the price by the board of trustees of the town.[1] The power to purchase fire engines and apparatus is necessarily or fairly to be implied as incident to a power granted a city's common council to pass ordinances for the prevention and suppression of fires and to appoint and remove fire wardens; and, by ordinance to prescribe the powers and duties of such fire wardens and of the fire engineers and firemen; and also the right to raise money by taxation for supporting the fire department.[2] Under a statutory authority to purchase fire engines and apparatus of all kinds for the use of the fire department of a city, the board of fire commissioners having charge of such matters may purchase hose carriages.[3]

§ 34. **Illustration of wrongfully incurred liability.**— Where the sum of $1,500 had been voted by a school district of Wyoming for contingent expenses, the Supreme Court of that state held that the purchase of a steam-heating apparatus for a sum largely in excess of that amount was not within the power of the

[1] Second National Bank of New Albany *v.* Town of Danville, (1878) 60 Ind. 504; Sheffield School Township *v.* Andress, 56 Ind. 157. See upon this subject, generally, Evansville, etc., R. R. Co. *v.* City of Evansville, 15 Ind. 395; City of Indianapolis *v.* Miller, 27 Ind. 394; Thompson *v.* City of Peru, 29 Ind. 305. On the principle, Halstead *v.* Board of Cömrs. of Lake County, 56 Ind. 363.

[2] Green *v.* City of Cape May, (1879) 41 N. J. Law, 45. It was said in the opinion: "The power to suppress fires, etc., would be nugatory without the power to obtain the means by which the suppression can be effected. The authority to prescribe the power and duties of firemen and fire engineers implies that there shall be apparatus, in the management of which duties shall arise and become the subject of municipal regulation. The power to organize a fire department unaccompanied with the power to equip the department with apparatus would be as futile as the privilege of raising an army without the power to provide weapons or subsistence. The power to do either would imply the power to effectuate the intent involved in the grant by the execution of its incidents. The contracts for the purchase of apparatus are clearly among the incidents of the grant. The power to purchase fire engines has been, in several states, sustained under the authority of the city to make police regulations for public safety, which, it is held, confers the power to take measures for the prevention of fires. Whether the power to suppress fires arises from the general safety clause of the charter or from express grant, it carries with it the right to purchase fire engines. 1 Dill. on Mun. Corp. § 94."

[3] Leonard *v.* Long Island City, (1892) 47 N. Y. St. Rep. 761; s. c., 20 N. Y. Supp. 26.

district board.[1] The court held the warrant issued by the school district for a steam-heating apparatus to be void for another reason that it was in violation of the statute of congress limiting the amount of indebtedness to be incurred by every political or municipal corporation, county or other subdivision of the territories of the United States to an amount not exceeding a certain percentage on the value of taxable property therein.[2]

§ 35. Purchase of cemetery grounds.— A charter of a municipal corporation conferring the power to purchase fire

[1] School District No. 3 in Carbon County *v.* Western Tube Co., (Wyo. 1895) 38 Pac. Rep. 922. It was said by the court: "Certainly our statute does not permit the contracting of debts far in excess of the appropriation made for contingent purposes for that year, and we doubt that such authorized expenditures would be countenanced anywhere in the absence of a statute giving a district school board express powers to contract for the district beyond the annual appropriations made by the annual school meeting, where such meeting is made the source of the power of taxation. It would authorize the creation of a floating indebtedness which should bind the district the same as a bonded indebtedness permitted by an act of the legislature. In some of the states the district board or some of its members are authorized either in express statutory terms or by implication, where the board or officer are charged with certain duties, to incur expenses for the district in limited sums for specific purposes, but this power to bind the district is strictly limited to the purposes named in the statutes. Conklin *v.* School District, 22 Kans. 521; School District *v.* Snell, 24 Mich. 350; Gibson *v.* School District, 36 Mich. 404; Johnson *v.* School District, 67 Mo. 319."

[2] School Dist. No. 3 of Carbon County *v.* Western Tube Co., (1895) 38 Pac. Rep. 922; Acts 49th Cong. (1st Sess.) chap. 818, § 4. It was urged before the court that the debt attempted to be incurred by the district board for the heating apparatus was a necessary one, and that the very existence and maintenance of the public schools required that they should be kept open and the pupils comfortably seated and warmed. The court said to this: "But this question is settled. The provisions of the act of congress were probably borrowed from the Constitution of Illinois, which contains a similar restriction, a limitation which has been judicially interpreted. The clause shall not become indebted 'in any manner or for any purpose' in the Illinois Constitution is construed to mean just what it says, and not to permit an exception that would allow a public corporation to incur indebtedness for supplies to meet its ordinary wants and necessities, an exception which the framers of the Constitution did not see fit to make and which the courts have no power to insert. Prince *v.* City of Quincy, 105 Ill. 138, 143, 216; City of Springfield *v.* Edwards, 84 Ill. 626; Law *v.* People, 87 Ill. 385. The same principle is sustained by the Supreme Court of the United States in construing a similar construction in the Constitution of Colorado. Lake Co. *v.* Rollins, 130 U. S. 662; s. c., 9 Sup. Ct. Rep. 651; Lake Co. *v.* Graham, 130 U. S. 674; s. c., 9 Sup.

apparatus, cemetery grounds, to establish markets and other things, for the execution of which power money would be a necessary means, in the absence of any positive restriction, confers the power to borrow money as an incident to the execution of such general powers.[1] A power of taxation conferred in the charter cannot be deemed to exclude the power of borrowing.[2] This city having contracted to purchase a cemetery lot, and pay for the same by its corporate bonds, it was held, having acted within the powers conferred by its charter, could not be prevented by a subsequent act of the legislature forbidding the issuing of bonds.[3]

§ 36. Erection of crematory for garbage, etc.—The Supreme Court of Wisconsin has held that, under the general power given by the statutes of Wisconsin to prevent or abate nuisances, a village board may contract for the building of a crematory for garbage, dead animals, etc.[4]

Ct. Rep. 654. It makes no difference for what purpose or in what manner the debt was created; if in excess of the statutory or constitutional limit it is wholly void."

[1] Mills *v.* Gleason, (1860) 11 Wis. 470.

[2] Ibid.; Clarke *v.* School District, 3 R. I. 199.

[3] Mills *v.* Gleason, (1860) 11 Wis. 470; see State *v.* Common Council, 7 Wis. 688; Smith *v.* Appleton, 19 Wis. 468.

[4] Kilvington *v.* City of Superior, (1892) 83 Wis. 222. The court said: "The power 'to prevent or abate nuisances'—that which occasions public hurt or inconvenience—is necessarily a very broad and comprehensive one, and essential, if not indispensable, to the purpose for which the village was created. It would hardly be questioned by any one that if garbage, manure, or dead animals were found within the village, in the interest of good order, cleanliness or public health, the board of trustees would have power to abate such nuisances by removing or otherwise making suitable disposition of them. To this end, it might provide for destroying them, instead of fouling the waters of a lake or stream of water with them, to be again cast up, to the prejudice of the public, or depositing them where they would create a new nuisance. To this end, if a garbage crematory becomes necessary, the board may, within a fair and *bona fide* exercise of their discretion, contract for its construction, and the village will be bound by the contract. Speaking of the powers of such corporations, in Spaulding *v.* Lowell, 23 Pick. 71, 74, SHAW, Ch. J., says: 'They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers or duties and accomplishment of the purposes of their association.' French *v.* Quincy, 3 Allen, 9, 12. This rule has been affirmed in this state, with the just qualification that such corporations may resort to the usual and convenient means of executing the powers granted; that is to say, as applied to this case, that the village, in order to prevent or abate nui-

§ 37. Use of private property for sewers.—Under the authority to construct sewers as incident to the general right of a municipal corporation to maintain streets and highways,[1] the governing authorities of a city may contract for a right to construct a sewer through private property and bind the city for the cost by way of damages agreed upon by the authorities and the owners of the private property.[2]

§ 38. Detection of criminals.—Municipal corporations, when not authorized to levy taxes to pay the expenses of detecting and bringing to justice persons guilty of crimes punishable under general laws, cannot through their governing board create an indebtedness against the corporation for any such purpose, whether by proclamation, resolution or ordinance.[3]

§ 39. Aiding private corporations.— A municipal corporation cannot become a shareholder or stockholder in a private corporation or borrow money or incur debts to aid extraneous

sances, might resort to such means as were usual and convenient. Mills *v.* Gleason, 11 Wis. 470, 491; Gilman *v.* Milwaukee, 61 Wis. 588, 592; Bell *v.* Platteville, 71 Wis. 139, 142; Meinzer *v.* Racine, 68 Wis. 241, 245. The power to prevent and abate nuisances is an express grant of power, and not an implied one; and 'it has long been an established principle in the law of corporations that they may exercise all their powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing so, unless restricted in this respect, they must have a choice of means adapted to ends, and are not confined to any one mode of operation,' and their discretion in this respect cannot be revised or interfered with by the courts, except where the substantive power is exceeded, or fraud is shown, or there is a manifest invasion of private rights. Dill. Mun. Corp. §§ 91, 94, and cases cited; Benson *v.* Waukesha, 74 Wis. 31, 39; Kelley *v.* Milwaukee, 18 Wis. 83, 85; Schanck *v.* Mayor, 69 N. Y. 444; Spaulding *v.* Lowell, 23 Pick. 17, 80. It was not necessary, therefore, that there should have been express power conferred on the village to build, or contract for building, the crematory. The village board might contract for it as a means adapted to the end of preventing or abating nuisances, and as a health measure, and so within the general purpose for which the village was organized."

[1] Cone *v.* City of Hartford, 28 Conn. 363. 366; Fisher *v.* Harrisburg, 2 Grant (Pa.), 291; Stoudinger *v.* City of Newark, 28 N. J. Eq. 187.

[2] Leeds *v.* City of Richmond, (1885) 102 Ind. 372. In the power granted to a city to construct a sewer outside of its limits, when necessary to afford an outlet for sewers within, is included the power to agree with owners of lands as to terms of their occupancy. Little *v.* City of Rochester, (1883) 17 N. Y. Wkly. Dig. 513.

[3] Murphy *v.* City of Jacksonville, (1881) 18 Fla. 318. Whether or not town trustees could bind a town by offering a reward for the apprehen-

objects, unless the power be expressly granted.[1] There is no power conferred upon a city to purchase real estate within its corporate limits designed for the benefit of an agricultural society that its annual fairs should be held therein, by a provision in its charter giving the council "full power and authority to purchase, and provide for the payment of the same, all such real estate and personal property as may be required for the use, convenience and improvement of the city."[2] Even with power, granted by

sion of a felon who had been guilty of homicide in the town has been questioned in Kentucky. Lee *v.* Trustees of Flemingsburg, (1838) 7 Dana (Ky.), 28.

[1] Mayor *v.* Wetumpka Wharf Co., 63 Ala. 611; Low *v.* Marysville, 5 Cal. 214; Douglass *v.* Placerville, 18 Cal. 643.

[2] City of Eufaula *v.* McNab, (1880) 67 Ala. 588. SOMERVILLE, J., speaking for the court, said: "It may be conceded that if the land in question had been purchased for an exclusively *public use*, as being designed for dedication to a purpose within the usual scope of municipal governments, it might be a proper exercise of corporate power under the above section, and the validity of the contract of purchase could not be affected or rendered invalid by any subsequent diversion of the land to unauthorized uses, not shown satisfactorily to have been mutually intended at the time of the purchase. 2 Dill. on Mun. Corp. § 444; Weismer *v.* Village of Douglas, 64 N. Y. 91; s. c., 21 Am. Rep. 586. But the terms of the charter are imperative that such property must be '*required* for the use, convenience and improvement of the city.' Collateral advantages, incidentally resulting in the promotion of the city's commercial or business prosperity, will not be sufficient. It is not contemplated or permitted that such property shall be acquired in aid of private enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement. As said by Mr. Justice MILLER in Loan Association *v.* Topeka, 20 Wall. 655, 660: "It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. The same view was expressed by BRICKELL, Ch. J., in the N. O. M., etc., R. R. *v.* Dunn, 51 Ala. 128, 136, where the following language is used: 'The power of taxation thus conferred (by the charter) must be limited and confined strictly to the purposes for which the corporation is created. The revenues derived from the exercise of this power must be faithfully applied to these purposes. The corporate authorities cannot, without a violation of duty and usurpation of power, appropriate the revenues thus produced to any other purposes or objects than such as are fairly expressed or reasonably implied in the charter. It is not material what is the character of the object, or how pressing the necessity, or what are the benefits, real or imaginary, which may flow to the city. If not within the purposes of the act of incorporation, there is a want of power in the corporate authorities.' It was said by the Supreme Court of Maine in Allen *v.* Inhabitants of Jay, 60 Me. 124, that 'taxation by the very meaning of the term implies the

its charter, in a city to aid in the construction of improvements partaking of a public character, the city could not, in the exercise of the power, contract to pay money, or to appropriate its revenues to aid in constructing the works of a private corporation.[1] There being no provision in the Constitution of West Virginia authorizing the levying of taxes to be used to aid private persons in conducting a private manufacturing business, the Supreme Court of the United States held that the legislature had no power to authorize a city of that state to issue its bonds for the purpose of lending them to persons engaged in manufacturing; the act, therefore, was invalid and all bonds issued under its authority were, as against the city, void.[2] The Supreme Court of Arkansas has held that the common council of a town has no power to appropriate money to aid the building of a court house in such town, as such an act is prohibited by that article of the Constitution of the state that no county, city or town, or other municipal corporation, shall appropriate money or loan its credit to any corporation, institution or individual.[3]

§ 40. Subscription to capital stock of railroad corporations.—Municipal corporations are clothed with no power, outside of express authority granted by statute, to subscribe to the stock of private corporations.[4] And if such authority be given by the legislature the mode and procedure prescribed by the statute must be strictly followed.[5] The legislature of a state may grant to municipal corporations power to subscribe to the capital

raising of money for *public uses*, and excludes the raising it for *private* objects and purposes.' 'I concede,' says BLACK, Ch. J., in Sharpless *v.* Mayor, 21 Pa. St. 147, 168, 'that a law authorizing taxation for any other than *public purposes* is void.' The court cited as sustaining the text: Loan Association *v.* Topeka, 20 Wall. 655; Allen *v.* Inhabitants of Jay, 60 Me. 124; s. c., 11 Am. Rep. 185; Lowell *v.* City of Boston, 111 Mass. 454; s. c., 15 Am. Rep. 39; Hanson *v.* Vernon, 27 Iowa, 28; s. c., 1 Am. Rep. 215; Railroad Co. *v.* Dunn, 51 Ala. 128, Weismer *v.* Village of Douglas, 64 N. Y. 91; s. c., 21 Am. Rep. 586."

[1] San Diego Water Co. *v.* City of San Diego, (1881) 59 Cal. 517.

[2] Parkersburg *v.* Brown, (1882) 106 U. S. 487; s. c., 1 Sup. Ct. Rep. 442.

[3] Russell *v.* Tate, 52 Ark. 541; s. c., 13 S. W. Rep. 130. As to the loaning of its credit by a municipal corporation to a private corporation, forbidden by constitutional provisions of the state, see City of Cleburne *v.* Brown, 73 Tex. 443; s. c., 11 S. W. Rep. 404.

[4] French *v.* Teschemaker, (1864) 24 Cal. 518; Gulf Railroad Co. *v.* Miami County, 12 Kans. 482.

[5] French *v.* Teschemaker, (1864) 24 Cal. 518.

stock of private corporations formed to carry out such public improvements as tend to increase the trade and business interests of the municipality.[1] In the absence of constitutional prohibition the legislature of a state may authorize municipal corporations to aid in the construction of railroads.[2] And a statute authorizing municipalities to aid in the construction of a railroad is not in conflict with the provisions of a State Constitution forbidding a loan of the credit of the state to private persons or corporations, and forbidding the state subscribing to the stock of any corporation, or from being interested in any work of internal improvement, and forbidding any person being deprived of his property without due process of law.[3] There is no ground for a constitutional objection to the grant of power by the legislature to a city to subscribe to stock of a railroad company in the fact that such company is a foreign corporation and that its road terminates at a point in another state from which it runs a line of boats to the city issuing its bonds in aid of the company.[4] The statute of Arkansas authorizing counties "having or controlling internal improvement funds, or credits granted to it by the state," to subscribe to the capital stock of any valid and duly organized railroad, has been held not to confer power upon counties to subscribe for stock in a railroad company and issue bonds of the county in payment for it which might by any possibility become a proper charge upon the taxpayers of the county.[5] The court adhered to this decision in a later case and held generally that a county or other municipal corporation had no power, independently of an express grant of authority, to subscribe for stock in a railroad company and issue bonds in payment of the subscription.[6] The Iowa Supreme Court has held that to aid in the construction of a railroad was not a *public purpose* within the meaning of a provision in the charter of a city that "whenever, in the opinion of the city council, it is expedient to borrow money for any *public purpose* the question shall be submitted," etc., and

[1] City of Bridgeport *v.* **Housatonuc** R. R. Co., (1843) 15 Conn. 475.

[2] Taylor *v.* City of Ypsilanti, 11 Fed. Rep. 925.

[3] Ibid. As to the power of Kansas cities under the legislation of that state to become interested in railroad enterprises and to issue railroad aid bonds, see Bard *v.* City of Augusta, 30 Fed. Rep. 906.

[4] Moulton *v.* City of Evansville, 25 Fed. Rep. 382.

[5] English *v.* Chicot County, (1871) 26 Ark. 454.

[6] Hancock *v.* Chicot County, (1877) 32 Ark. 575.

there was no power conferred by the charter to borrow money for the purpose of aiding in the construction of a railroad, the power to borrow money conferred upon the city not authorizing the loan of the credit of the city.[1] The Supreme Court of Illinois has recently held that where an act incorporating a railroad company gave power to towns along the line of its road to subscribe to the capital stock of the company, a town along its line, subsequently incorporated by an act of the same session of the legislature, which did not enumerate among the powers of the town the power to subscribe to such stock, could make a valid subscription to such stock, there being no inconsistency between the act incorporating the railroad company and the one incorporating the town.[2]

[1] Chamberlain *v.* City of Burlington, (1865) 19 Iowa, 395.

[2] Hutchinson *v.* Self, (1894) 153 Ill. 542; s. c., 39 N. E. Rep. 27. As to the constitutionality of acts authorizing municipal subscription to stock of railroads, etc., see Commonwealth ex rel. Armstrong *v.* Perkins et al., Commissioners of Allegheny County, (1862) 43 Pa. St. 400. As to power of municipal corporations under the Constitution and laws of Colorado to make donations or subscribe to capital stock of private corporations, see Colorado C. R. R. Co. *v.* Lea, 5 Col. 192; Packard *v.* Jefferson County, 2 Col. 338; People *v.* Pueblo County, 2 Col. 360. In Kentucky: W. & M. S. T. R. Co. *v.* Clark Co. Ct., (1860) 3 Metc. 144; Shelby Co. Ct. *v.* C. & O. R. R. Co., (1871) 8 Bush, 216; Mercer Co. Ct. *v.* S. M. & H. T. Co., (1874) 19 Bush, 257; Mercer Co. Ct. *v.* Ky. River Navigation Co., (1871) 8 Bush, 307; C. & O. R. R. Co. *v.* Barren Co. Court, 8 Bush, 215; Foreman *v.* Murphy, (1870) 7 Bush, 304. Subscription made valid by confirmation by act of the legislature. Shelby Co. Ct. *v.* C. & O. R. R. Co., 8 Bush, 218. Legislature may modify, etc., after a vote is taken and before the actual making of subscriptions. C. & O. R. R. Co. *v.* Barren Co. Court, (1874) 10 Bush, 610. Constitutionality of acts authorizing subscriptions settled. Shelby Co. Ct. *v.* C. & O. R. R. Co., (1871) 8 Bush, 215; Tyler *v.* E. & P. R. R. Co., (1872) 9 Bush, 515; Bullock *v.* Curry, 2 Metc. 174; Allison *v.* L. H. C. & W. R. Co., 9 Bush, 248; Shelbyville Trustees *v.* S. & E. T. Co., 1 Metc. 57. Under what circumstances the legislature may repeal acts granting authority to subscribe to capital stock of railroad company. C. & L. R. R. Co. *v.* Kenton County Court, (1851) 12 B. Mon. 150; M. T. Co. *v.* How, (1854) 14 B. Mon. 432. In Missouri: Osage Valley & Southern Kansas R. R. Co. *v.* Morgan County Court, (1873) 53 Mo. 156; Rubey *v.* Shain, (1873) 54 Mo. 207. As to the power of the legislature to authorize such subscriptions, see St. Joseph & Denver City R. R. Co. *v.* Buchanan County Court, 39 Mo. 485; State *v.* Saline County Court. (1870) 45 Mo. 242. As to raising money to aid in the construction of a railroad, see Stevens *v.* Anson, 73 Me. 489. In Pennsylvania R. R. Co. *v.* City of Philadelphia, (1864) 47 Pa. St. 189, the power to invest its stocks, money or credit directly or indirectly in aid of a steamship line between this city

§ 41. Power of the legislature as to corporations in such matters.— It is in the power of the legislature of a state to confer on municipal corporations larger powers than would be implied from the general purposes of their creation, and when the legislature of a state, in express terms authorizes cities or towns to subscribe for stock in an enterprise, of the kind usually known as internal improvements, canals, railroads and plank-roads, for instance, the contract of such cities or towns, made pursuant to the statute, is binding upon them.[1]

§ 42. Constitutionality of legislation authorizing such aid.—The Supreme Court of Alabama has sustained the acts authorizing cities to aid by subscription to stock and issue of bonds in the construction of railroads as constitutional.[2] In an

and foreign ports, in the absence of special legislation authorizing it, was denied to this city by the Supreme Court of Pennsylvania. See chap. "Municipal Aid."

[1] Mayor & Aldermen of Wetumpka *v.* Winter, (1857) 29 Ala. 651. It appeared in this case that certain bonds had been issued by a city under statutory authority, and it was provided by the statute that "the money arising from the sale of said bonds may be appropriated under the supervision and direction of the mayor and aldermen of [the city], for any purpose of internal improvement for the benefit of the citizens of [the city]." These bonds were used to aid in the construction of a plank road which was to enter the city from an outside point. There was a contention that this was an improper use of the bonds on the part of the city; that inasmuch as the powers of municipal corporations are conferred for their well-being and generally confined to police and sanitary regulations within the chartered limits of such corporations, the proper construction of the words "internal improvements" in the statutes was that they applied to no works except within the city limits. The Supreme Court of Alabama construed the words, however, to authorize the city to pledge its credit, and thereby raise money to aid in the construction of some work of the kind generally referred to as internal improvements in the general acceptation of the words as a means of improving the commerce of the city, and thereby benefiting its citizens. As to the power of the legislature to confer upon municipal corporations the power to lend its credit in aid of railroad or other improvements, see Fielder *v.* M. & E. R. R. Co., 51 Ala. 178.

[2] Gibbons *v.* Mobile & Great Northern R. R. Co., (1860) 36 Ala. 410, adhering to the doctrine declared in Stein *v.* Mayor, Aldermen, etc., of Mobile, (1854) 24 Ala. 591, that although the only legitimate object of taxation is the support and maintenance of government, yet this purpose embraces a wider range than the mere machinery employed in its administration; that the power authorizes the employment of the necessary appliances to augment the aggregate wealth and prosperity of the inhabitants of the city; and that this may be accomplished by providing outlets for commerce, opening channels of

early leading case in Wisconsin, involving the lending of its credit by the issue of its bonds in aid of a railroad company by a city of that state, the constitutionality of the act granting the power to the city to do so was vigorously attacked on all points. The Supreme Court, however, sustained the constitutionality of the act, holding that the constitutional provisions that the "credit of the state shall never be given or loaned in aid of any individual, association or corporation," and that "the state shall never contract any debt for works, of internal improvement, nor be a party in carrying on any such works were limitations upon the state alone and did not prohibit the legislature to authorize counties, towns and cities to loan their credit or contract debts for works of internal improvement; that the Constitution in another place recognized the power of municipal corporations to loan their credit and required the legislature simply to restrict it.[1] The legislature may authorize a town to subscribe for the stock of a railroad company and to incur indebtedness for making internal

inter-communication with other parts of the state, etc. Mayor, etc., of Wetumpka *v.* Winter, 29 Ala. 651; Sharpless *v.* Mayor, etc., 21 Penn. St. 147; Louisville & Nashville R. Co. *v.* County Court, 1 Sneed, 637. In Stein *v.* Mayor, etc., *supra*, the court reviewed as to the power as well as purposes of taxation the following cases, arising in different states, to wit: Battle *v.* Corporation of Mobile, 9 Ala. 234; Intendant of Marion *v.* Chandler, 6 Ala. 899; State *v.* Estabrook, 6 Ala. 653; Nichol *v.* Mayor of Nashville, 9 Humph. 252; Hope *v.* Deaderick, 8 Humph. 1; Commonwealth *v.* McWilliams, 11 Penn. St. 61; Parker *v.* Commonwealth, 6 Barr, 507; Commonwealth *v.* Judges, etc., of Lebanon County, 8 Barr, 391; Commonwealth *v.* Painter, 10 Barr, 214; Goddin *v.* Crump, 8 Leigh, 120; Burgess *v.* Pue, 2 Gill, 19. In Winter *v.* City Council of Montgomery, (1880), 65 Ala. 403, the Supreme Court of Alabama sustained the act which in this case authorized the subscription by this city to stock in a matured company and issue of bonds in payment for it, and declared this rule: "To justify a court in pronouncing a statute void, it must be apparent that it is an exercise of powers not legislative — of power committed to one or more of the other departments of the government, or that it is violative of some provision of the Constitution, state or federal. Whether the policy of the statute is sound — whether it will promote the public good — whether it is in harmony with natural right or will obstruct justice are not judicial questions. Dorman *v.* State, 34 Ala. 216."

[1] Clark *v.* City of Janesville, (1859) 10 Wis. 136, following State ex rel. Dean *v.* City of Madison, 7 Wis. 688. See, also, Watertown *v.* Cady, 20 Wis. 501. In Bushnell *v.* Beloit, (1860) 10 Wis. 195, the same court has declared that the Constitution of Wisconsin clearly recognized the principle that municipal corporations may be clothed with power to "borrow money," "contract debts" and to "loan their credit;" and that the legislature being required to restrict such corporations in the exercise of such powers was an

improvements; and the corporation would be liable for the payment of such indebtedness.[1]

§ 43. In what respect the power of a municipality is restricted.— A city, the charter of which fully empowers and

admission that the power existed. See Foster *v.* Kenosha, 12 Wis. 616.

[1] Bushnell *v.* Beloit, (1860) 10 Wis. 195. See, also, Brodhead *v.* Milwaukee, 19 Wis. 624; State ex rel. Carpenter *v.* Beloit, 20 Wis. 79; Whiting *v.* Railroad Co., 25 Wis. 167; Bridgeport *v* Housatonuc R. R. Co., 15 Conn. 475; Sharpless *v.* Mayor, etc., 21 Penn. St. 147; Comm. ex rel. Thomas *v.* Comrs. Allegheny Co., 7 Am. Law Reg. 92; Talbot *v.* Dent, 9 B. Mon. 526; Slack *v.* Maysville & Lexington R. R. Co., 13 B. Mon. 1; Cheaney *v.* Hooser, 9 B. Mon. 250; Goddin *v.* Crump, 8 Leigh, 120; Nichol *v.* Mayor, etc., Nashville, 9 Humph. 252; Cincinnati R. R. Co. *v.* Clinton County, 1 Ohio St. 77; Steubenville & Ind. R. R. Co. *v.* North Township, 1 Ohio St. 105; Shaw v. Dennis, 5 Gilm. (Ill.) 405; Ryder *v.* Alton & Sangamon River R. Co., 13 Ill. 516, Dubuque County *v.* D. & P. R. R. Co., 4 G. Gr. 1; Vicksburg, Shreveport & Texas R. R. Co. *v.* Ouachita, 11 La. Ann. 649; Parker *v.* Scogin, 11 La. Ann. 629; City of Aurora *v.* West, 9 Ind. 74. As to the constitutionality of legislative enactments authorizing a subscription to stock, etc., in aid of railroads, see Stewart *v.* Board of Supervisors of Polk County, (1870) 30 Iowa, 9; Goddin *v.* Crump, 8 Leigh, 120; Starin *v.* Genoa, 29 Barb. 442; Bank of Rome *v.* Village of Rome, 18 N. Y. 38; Prettyman *v.* Supervisors, etc., 19 Ill. 406; Robertson *v.* Rockford, 21 Ill. 451; Johnson *v.* Stark Co., 24 Ill. 75; Pattison *v.* Yuba Co., 13 Cal. 175; Blanding *v.* Burr, 13 Cal. 343; Hobart *v.* Supervisors, 17 Cal. 23; Taylor *v.* Newberne, 2 Jones Eq. (N. C.) 141; Caldwell *v.* Justices of Burke, 4 Jones Eq. (N. C.) 323; Louisville, etc., R. R. Co. *v.* Davidson, 1 Sneed, 637; Nichol *v.* Mayor, etc., of Nashville, 9 Humph. 252; Railroad Co. *v.* Comrs. of Clinton County, 1 Ohio St. 77; Trustees of Paris *v.* Cherry, 8 Ohio St. 564; Cass *v.* Dillon, 2 Ohio St. 607; State *v.* Comrs. of Clinton County, 6 Ohio St. 280; State *v.* Van Horne, 7 Ohio St. 327; State *v.* Trustees of Union, 8 Ohio St. 394; Trustees, etc., *v.* Shoemaker, 12 Ohio St. 624; State *v.* Comrs. of Hancock, 12 Ohio St. 596; Powers *v.* Dougherty County, 23 Ga. 65; San Antonio *v.* Jones, 28 Tex. 19; Commonwealth *v.* McWilliams, 11 Penn. St. 61; Moers *v.* City of Reading, 21 Penn. St. 188; Slack *v.* Railroad Co., 13 B. Mon. 1; Talbot *v.* Dent, 9 B. Mon. 526; City of St. Louis *v.* Alexander, 23 Mo. 483; City of Aurora *v.* West, 9 Ind. 74; Cotton *v.* Comrs. of Leon, 6 Fla. 610; State ex rel. Copes *v.* Charleston, 10 Rich. (S. C.) 491; Comrs. of Knox County *v.* Aspinwall, 21 How. 539; Comrs. of Knox County *v.* Wallace, 21 How. 546; Zabriskie *v.* Railroad Co., 23 How. 381; Amey *v.* Mayor, etc., 24 How. 364; Gelpcke *v.* Dubuque, 1 Wall. 175; Thomson *v.* Lee County, 3 Wall. 327; Rogers *v.* Burlington, 3 Wall. 654; Gibbons *v.* Mobile & G. & Northern R. R. Co., 36 Ala. 410; St. Joseph, etc., R. R. Co. *v.* Buchanan County Court, 39 Mo. 485; State *v.* Linn County Court, 44 Mo. 504; Stewart *v.* Board of Supervisors of Polk County, 30 Iowa, 9; John *v.* C. R. & F. W. R. R. Co., 35 Ind. 539; Ex parte Selma, etc., R. R. Co., 45 Ala. 696; Stockton & Visalia R. R. R. Co. *v.* Stockton, 41 Cal. 147.

authorizes its city council "to make, ordain and enact such laws and regulations (not contrary to the Constitution and laws of this state) as may be deemed necessary in relation to the streets and highways, public buildings and powder magazines, and every other matter and thing which they may deem necessary for the good order and welfare of said city," is not authorized to construct or aid in constructing a plank road or bridge beyond the corporate limits of said city.[1]

[1] City Council of Montgomery *v.* Montgomery & Wetumpka Plank Road Co., (1857) 31 Ala. 76, holding a loan of the city funds to this company for construction of its road and a bridge beyond the limits of the city to have been unauthorized and void; STONE, J., said: "We find no express authority [in the charter of this city] to enter into the contract declared on; neither is the exercise of such power necessary to carry into effect any of the expressly granted powers; nor was the exercise of the power under consideration a necessary means of effecting the purpose for which this corporation was created. * * *" As to the effect of the general words in the charter it was said: "In the case of Beaty *v.* Lessee of Knowler, 4 Pet. 152–171, the Supreme Court of the United States held the following language: 'The provision in the 10th section that the 'directors shall have power to do whatever shall appear to them necessary and proper to be done for the well ordering of the interest of the proprietors, not contrary to the laws of the state,' was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred. If the words of this section are not to be restricted by the other provisions of the statute, but to be considered according to their literal import, they would vest in the directory a power over the land only limited by their discretion. They could dispose of the land and vest the proceeds in any manner which they might suppose would advance the interest of the proprietors. It is only necessary to state the consequence to show the danger of such a construction.'" Citing The People *v.* Utica Ins. Co., 15 Johns. 358, 383; Stetson *v.* Kempton, 13 Mass. 272, 278, 279; State of Ohio *v.* Washington Social Library Co., 11 Ohio, 96; Ang. & Ames on Corp. (3d ed.) 84, 85, 86. The language found in the charter which was construed in the case of Beaty v. Lessee of Knowler, *supra*, strikingly resembles the clause from the act incorporating the city of Montgomery, which we are considering. The grant of power in the one case is that "the *directors shall have power to do whatever shall appear to them to be necessary and proper to be done*," etc. In the other it embraces "*every other matter and thing which they may deem necessary for the good order and welfare of said city.*" In this case, as in the case from 4 Pet. *supra*, if the words of the charter "are not to be restricted by the other provisions of the statute, but to be considered according to their literal import, they would vest in the corporate authorities a power * * * only limited by their discretion." We cannot believe it was the intention of the legislature to confer on the city council of Montgomery "unlimited power," but only to grant to that body the right to exercise "a discretion within the scope of the authority conferred. In other words, we limit the

§ 44. Subscription for less than the amount voted.—When authorized by the legislature to issue bonds which may be delivered to a railroad corporation in payment of a subscription to its capital stock by a municipal corporation, the subscription to stock or issue of bonds may be for less than the amount voted.[1]

words, 'every other matter and thing,' as found in the act, to such subjects as are cognate to the powers expressly conferred."

[1] Chicago, Kansas & Western R. R. Co. *v.* Ozark Township, (1891) 46 Kans. 415. The court cites Turner *v.* Woodson County, 27 Kans. 314, and then said: "This question has also been virtually decided * * * by the Supreme Court of Alabama [in] Winter *v.* City Council of Montgomery, 65 Ala. 403; s. c., 7 Am. & Eng. R. R. Cas. 307. This case is as nearly in point, as nearly applicable, as nearly analogous to the present case as it could well be, and we know of no authority to the contrary, and the principle enunciated in the cases cited is substantially that when authority is given to the officers of a public corporation, by an election or otherwise, to issue a certain amount of the bonds of the corporation, the officers will have the power and the right, wherever there is a sufficient reason therefor, to issue a less amount of the bonds of the corporation." The court further on in the opinion said: "The object of the law in permitting public corporations to subscribe for stock in railroad companies, and to issue their bonds in payment therefor, is not intended as a business transaction like that consummated by an individual when he purchases stock and pays therefor in money or in something else. It is merely for the purpose of procuring greater facilities for travel and transportation for the general public which is always considered as a public purpose and not merely as a private purpose, enterprise or business transaction. The act itself authorizing counties, townships and municipal corporations to subscribe for stock in and to issue bonds to railroad companies, is entitled, 'An act to enable counties, townships and cities to aid in the construction of railroads,' etc. Laws of 1876, chap. 107. This shows that the main object of the act was to enable counties, townships and cities '*to aid in the construction of railroads*,' and was not to permit such corporations to engage in such transactions as a mere business venture, or as an investment in stock or a speculation in bonds and stocks." Twenty years ago it was said by this court in the case of Comrs. of Leavenworth Co. *v.* Miller, 7 Kans. 479, 528, 529, 532, among other things, as follows: "If a railroad company is purely a private corporation, and if the construction and operation thereof is purely a private purpose, neither the government nor any municipal corporation has any right to become a stockholder therein. Governments were not organized for the purpose of engaging in private enterprises or private business, but only for the transaction and promotion of public affairs. Even if the purchase of stock in a railroad company should be a paying transaction as an investment (which unfortunately for counties and municipal corporations it is not), still a governmental organization would have no right for that reason alone to engage in it, for governmental organizations are not created for purposes of speculation, nor are they created for the purpose of promoting the general welfare of the individual members thereof

§ 45. The effect of subsequent legislation upon such a subscription.— A city in Georgia, the mayor and council of which had been by statute empowered "to borrow money and contract loans, not to exceed $200,000, for the use of the city * * *; and to pledge the funds or property of the corporation * * * and the commons thereof, for the redemption of such loan or loans, and also shall have power to purchase any real or personal estate for the use and benefit of the corporation, * * *" subscribed for shares of stock of a railroad company. After the subscription the city authorities were by statute "empowered to contract a further loan of the same amount, over and above the amount already borrowed, and that the town commons and public property of the city be pledged for the payment of the same." The preamble to this last act referred to the passage of the first act, concluding: "And whereas, that sum has been already borrowed *and vested in stocks for the purposes of internal improvement.*" The Supreme Court of Georgia held that the effect of this last

or citizens. The increased facility for travel and transportation is the main object in the creation of railroads, and this it is which constitutes a railroad a public purpose. All other benefits, though belonging of right to the public, are simply incidental." Pages 528 and 529. "The opening of hotels, the running of stage coaches, hacks, drays, etc., have never been considered as incumbent upon governments. Governments have never undertaken to keep hotels, run stage coaches, etc., and it has never been considered that there was any moral or legal obligation resting upon them to do so. But the duty of opening highways, canals and other like improvements for the accommodation of travel and commerce, has always been considered most binding upon all governments." Page 532. In the case of Winter *v.* City Council of Montgomery, above cited, the Supreme Court of Alabama used the following, among other language: "We do not discover that the city council varied the propositions which were submitted to and approved by the voters at the election. The proposition was, when fairly construed, that the city should extend aid to the railroad company by the issue of its bonds to an amount not exceeding one million of dollars, which were to be employed in building and equipping the road. It was not pecuniary gain, not any of the advantages which would accrue to an individual from membership in the railroad company that formed a motive or inducement for clothing the city with power to aid in the construction of the road. The benefits which would result to the commerce and industry of the city, the increased facilities of access to it, were the purposes for which the power was conferred. If these could be secured without involving the city in a debt of one million of dollars, it was not only within the power, but it was the duty of the city council to secure them for the least practicable sum. The power to create the larger includes the power to create the lesser debt. *Omne majus continet in se minus.*" 7 Am. & Eng. R. R. Cas. 319.

statute, by necessary implication was to ratify and make valid the subscription for the shares of stock of the railroad corporation.[1]

§ 46. Statutory authority to construct a railroad.— The Supreme Court of Ohio has sustained the constitutionality and validity of the act of the legislature of that state, the general scope and purpose of which was to authorize cities of the state of a certain population to construct a line of railroad leading therefrom to any other terminus in the state, or in any other state, through the agency of a board of trustees, etc., with authority to such board of trustees to borrow a sum of money to a limited amount, and to issue bonds of the city, secured by a mortgage upon the railway and its net income, with a pledge of the faith of the city to levy a tax sufficient, with the net income of the road, to pay the interest upon and provide a sinking fund for the payment of the bonds.[2]

§ 47. Constitutional provisions construed.— The constitutional provision in Kentucky that no act of the legislature authorizing the creation of any debt on behalf of the commonwealth shall become effective until it has been submitted to the people at a *general* election, and shall have received a majority of all

[1] Winn *v.* City Council of Macon, (1857) 21 Ga. 275.

[2] Walker *v.* City of Cincinnati, (1871) 21 Ohio St. 14. SCOTT, Ch. J., said: "That it is within the legitimate scope of legislative power to authorize a municipality of the state to aid in the construction of a public improvement, such as a railroad, by becoming a stockholder in a corporation created for that purpose, and to levy taxes to pay the subscription, must be regarded as fully settled in this state by repeated adjudications. In the case of C., W. & Z. R. R. Co. *v.* Comrs. of Clinton County, 1 Ohio St. 77, the subject was very fully considered; and it was held that as the state may itself construct roads, canals and other descriptions of internal improvements, so it may employ any lawful means and agencies for that purpose, among which are private companies incorporated for the construction of such improvements. And it was said that for much stronger reasons counties might be authorized to construct works of a similar kind, of a local character, having a special relation to their business and interests. And, as the state might construct or authorize the counties to construct these works entire, or create corporations to do it entire, it was held that as a question of power each might be authorized to do a part. * * * And if, in the absence of a constitutional prohibition, a municipal corporation may be authorized to aid, by stock subscriptions, in the construction of a railway which has a special relation to its business and interests, upon what principle shall we deny that it can be authorized to construct it entirely at its own expense, when its relation is such as to render it essential to the business interests of the municipality?"

"the votes then cast" does not include debts created by a county or other municipal division of the state. Whether tax in aid of the construction of a turnpike for instance shall be levied or not may be submitted to the voters of a county or magisterial district of a county at a *special* election.[1]

§ 48. What is not a work of "internal improvement," in the meaning of Nebraska statute.— A steam grist mill is not a work of internal improvement within the meaning of the statute of Nebraska which authorizes counties, cities and precincts of organized counties "to issue bonds to aid in the construction of any railroad or other work of internal improvement."[2]

[1] Walton *v.* Riley, (1887) 85 Ky. 413; s. c., 3 S. W. Rep. 605. See Slack *v.* Maysville & Lexington R. R. Co., (1852) 13 B. Mon. 1. In People ex rel. McCagg v. Mayor, Comptroller & City Clerk of the City of Chicago, (1869) 51 Ill. 17; s. c., 2 Am Rep. 278, it was held that the legislature might be regarded as prohibited by the clause of the State Constitution which prohibited the state from creating a debt exceeding $50,000 without the consent of the people, manifested by a vote at a general election, from forcing one of the municipalities of the state to incur debts for an amount larger than $50,000 without the consent of the people of such municipal division of the state. The court said: "What is the real value of this provision of the Constitution if the legislature, inhibited from incurring a debt beyond fifty thousand dollars on behalf of the state, may force a debt tenfold or one hundred-fold greater, for there is no limit to the power upon all the cities of the state? We can perceive none. Where these municipalities become so indebted by compulsion of the legislature the whole state, in its real and substantive, if not in its corporate body, will in truth and fact, be the debtor, for the same power of coercion can be applied to counties and towns, and as the state is made up of cities, counties and towns, the whole state may thus become involved. This provision, then, would be no restriction upon the power to create a debt beyond a certain amount, and would fail of its purpose of protecting the state and its citizens from oppressive burdens."

[2] Osborne *v.* County of Adams, (1882) 106 U. S. 181; s. c., 1 Sup. Ct. Rep. 168, affirming Osborne *v.* County of Adams, (1881) 2 McCrary, 97. The court distinguished Township of Burlington *v.* Beasley, 94 U. S. 310, as follows: "That case arose under a statute of Kansas, which empowered municipal townships in that state to issue bonds for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto, or the taking of stock therein, or for other works of internal improvement." The bonds there in suit were issued to aid in the construction and completion of, and to furnish the motive power for, a steam custom grist mill. It was held that the statute, reasonably interpreted, embraced a grist mill operated by steam, as well as one run by water power; that since municipal aid was authorized for "the construction of * * * water power," the phrase "other works of internal improvement," in the

§ 49. **What is such a work.**— The Nebraska Supreme Court has held that a water grist mill erected for public use, the rates of toll to be determined by the county commissioners, was a work of internal improvement within the meaning of the statute of that state authorizing counties and cities in that state "to issue bonds or aid in the construction of any railroad or other work of internal improvement * * *."[1]

§ 50. **Contracts of guaranty.**— The authority to sell negotiable paper held by a city does not carry with it, as an incident,

Kansas statute, might be fairly construed as embracing works of the minor class, and consequently as embracing a steam grist mill. The court was somewhat influenced, as plainly appears from its opinion, by decisions of the Supreme Court of Kansas, particularly that of Commissioners of Leavenworth County *v.* Miller, 7 Kans. 479. The present case is different. The only work of internal improvement specially in the Nebraska statute is a railroad, and we are not justified by anything in Township of Burlington *v.* Beasley, or in the decisions of the courts of Nebraska in holding that a steam or other kind of grist mill is of the class of internal improvements which municipal townships in that state are empowered, by the statute in question, to aid by an issue of bonds." For cases holding that the right to erect public buildings, such as jails and court houses, derives no support from such a statute, see Union Pacific Railroad *v.* Lincoln County, 3 Dill. 300; Dawson County *v.* McNamar, 10 Neb. 276.

[1] Traver *v.* Board, etc., of Merrick County, (1883) 14 Neb. 327. Citing as authority for this ruling: Guernsey *v.* Burlington Township, 4 Dill. 372, 375; Township of Burlington *v.* Beasley, 94 U. S. 310, 313. In State ex rel. Bowen *v.* Adams County, (1884) 15 Neb. 568, in which the Supreme Court denied a mandamus to compel a levy of a tax to pay interest on an issue of bonds of the county in aid of a steam grist mill on the ground that there was no statute in that state authorizing the voting of aid to such mills, and that bonds voted in aid of them were invalid, it was said that the decision in the case of Traver *v.* Board, etc., Merrick County, 14 Neb. 327, was based almost entirely upon the statute authorizing the condemnation of private property for the purpose of erecting dams and overflowing lands in order to obtain power to propel mills, and upon the decisions of the Nebraska Supreme Court in Nosser *v.* Seeley, 10 Neb. 460, and Seeley *v.* Bridges, 13 Neb. 547. In Traver *v.* Board, etc., Merrick County, *supra*, it was said on page 334: "There is a clear distinction between aiding the development of the water power of the state — a power which is continuing in its nature, and may be used without cost or expense and must be used at certain points on a stream where a dam can be erected and power obtained — and a mill propelled by steam that must be attended with a continuous cost for fuel, and may at any time be removed to another locality." In County Commissioners *v.* Chandler, (1877) 96 U. S. 205, the Supreme Court of the United States held that a bridge intended for and used as a thoroughfare to be a public highway and, hence, a work of "internal improvement," within the mean-

the power to guarantee it.[1] A county in Arkansas cannot be bound by a contract entered into by the county judge guaranteeing payment for goods to be sold one who has a contract for the construction of a turnpike.[2] A municipal corporation authorized by statute to obtain money on loan, on the faith and credit of the corporation, for the purpose of contributing to works of internal improvement, may, under the power granted by the statute, guarantee the payment of the bonds of a railway company.[3]

§ 51. **Employment of agents or attorneys.**—There is authority in the Revised Statutes of Maine, relating to towns, to expend money "for the necessary town charges," after specifying certain other purposes. Under those words towns may employ a reasonable number of agents or attorneys to advance or protect the rights of towns before any legally constituted tribunal;[4] but they do not authorize a town to raise and expend money to send lobbyists before the legislature.[5] The board of directors of schools in Louisiana have authority to constitute or defend suits, and the right to incur liability for the costs of such suits follows, as a matter of course.[6] Reasonable attorney's fees in an action against village trustees to enjoin the collection of a tax, and defended in good faith, are a proper charge against a

ing of the Nebraska statute authorizing cities, counties and precincts in that state to issue bonds in aid of works of "internal improvement."

[1] Carter *v.* City of Dubuque, (1872) 35 Iowa, 416.

[2] Dickinson Hardware Co. *v.* Pulaski County, 55 Ark. 437; s. c., 18 S. W Rep. 462.

[3] City of Savannah *v.* Kelly, (1883) 108 U. S. 184; s. c., 2 Sup. Ct. Rep. 472. Mr. Justice MATTHEWS, speaking for the court, said that the fact that the money "was not advanced directly to the city, but upon its assurance of repayment to the railroad company, is not a departure even from the letter of the law, much less from its meaning; nor does the fact that the money was advanced partly on the credit of the railroad company diminish the presumed reliance of the purchaser upon that of the city with which it was joined. It is difficult to conceive of language more comprehensive than that employed to embrace *every form of securities in which the faith and the credit of the city might be embodied*, and that in such cases it is not important to the character of the transaction that the money is obtained in the first instance by the railroad company, upon the credit of the city, was directly ruled in Rogers *v.* Burlington, 3 Wall. 654, and affirmed in Town of Venice *v.* Murdock, 92 U. S. 494."

[4] Inhabitants of Frankfort *v.* Inhabitants of Winterport, (1865) 54 Me. 250.

[5] Ibid.

[6] Fisher *v.* Board of Directors of City Schools of New Orleans, (1892) 44 La. Ann. 184; s. c., 10 So. Rep. 494.

village under a statute authorizing village trustees "to employ an attorney or attorneys for the transaction of any matter requiring legal skill."[1] The Kansas Supreme Court has held that whenever a county is interested at all in the result of a suit, either in its own behalf or in that of some township of the county, and the suit is brought against the legal representatives of the county, and is beyond the limits of the county, as, for instance, a *mandamus* proceeding against the commissioners of a county before the Supreme Court, the county commissioners may, if they choose, employ counsel to take care of the interests of the county.[2] This rule has been declared in Kansas. A county's contract with a counselor at law for services, such as are required by law to be performed by the county attorney, is *prima facie* void.[3] So, also, is a contract by a city for services as an attorney or counselor at law, such as the law requires to be performed by the city attorney.[4]

§ 52. Contracts for legal services — when allowed.— Towns in Illinois have power, at their annual town meetings, to provide for the institution and defense of all suits in which they are interested, and a town meeting may exercise the power by resolution directing the supervisor to procure legal services, and such a contract will be binding on the town should the amount agreed

[1] Squire *v.* Preston, (1894) 82 Hun, 88; s. c., 31 N. Y. Supp. 174.

[2] Thacher *v.* Comrs. of Jefferson County, (1874) 13 Kans. 182; People *v.* Supervisors of N. Y., 32 N. Y. 473; Brady *v.* Supervisors of N. Y., 2 Sandf. 460; Gillespie *v.* Broas, 23 Barb. 370.

[3] Clough *v.* Hart, (1871) 8 Kans. 487.

[4] Ibid. In Hugg *v.* City Council of City of Camden, (1878) 29 N. J. Eq. 6, where there was a city ordinance providing that the solicitor of the city should prosecute and defend all suits, etc., brought by or against the city, the chancellor refused a mandatory injunction to restrain the city from employing other counsel, on the ground of possible irreparable injury to the city, the suit being ready for trial, and on the ground that the complainant's right was not clear. As to the employment of additional counsel to assist corporation counsel or to conduct professionally business in which the city is interested, see Smith *v.* Mayor, etc., of New York, (1875) 5 Hun, 237. As to employment of attorneys by counties, see Brome *v.* Cuming County, 31 Neb. 362; s. c., 47 N. W. Rep. 1050; Board Comrs. Rush County *v.* Cole, 2 Ind. App. 475; s. c., 28 N. E. Rep. 772; Beebe *v.* Board Suprs. Sullivan County, 64 Hun, 377; s. c., 19 N. Y. Supp. 629; Waters *v.* Trovillo, 47 Kans. 197; s. c., 27 Pac. Rep. 822; Butler *v.* Sullivan County, 108 Mo. 630; s. c., 18 S. W. Rep. 1142; Lassen County *v.* Shinn, 88 Cal. 510; s. c., 26 Pac. Rep. 365; Fouke *v.* Jackson County, 84 Iowa 616; s. c., 51 N. W. Rep. 71.

to be paid not be so great, in view of the interests involved, as to indicate bad faith.[1] The Supreme Court of Illinois has upheld as implied, under the legislation of that state with reference to towns, the power of the supervisor of a town to enter into a contract of retainer with an attorney at law to defend a suit instituted against the town upon coupons attached to bonds of the town the validity of which was disputed.[2] In case, in the exercise of their judgment and discretion, the governing board of a county conceive that the interests of the county are involved in a certain question, and take legal measures by suit or otherwise, to advance or protect those interests, the expense incurred thereby becomes a legal charge against the county, notwithstanding the judgment of the court in the matter be that a wrong remedy was adopted, or that there was no remedy at all.[3] A county, under the statutory power "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers," may retain attorneys to resist the collection of a tax in the action of a taxpayer who has been induced by the courts to refuse to pay a tax levied by the state for payment of interest on certain county bonds, the object being to test the validity of such bonds.[4] And the statute making it the duty of county boards to take suitable measures for prosecuting and defending all suits to be brought by or against their respective counties, and all suits which it is necessary to prosecute or defend to enforce the collection of all taxes charged on the state assessment, does not take away the right to retain an attorney in such a case.[5]

[1] Town of Mt. Vernon *v.* Patton, (1879) 94 Ill. 65.

[2] Town of Bruce *v.* Dickey, (1886) 116 Ill. 527; s. c., 6 N. E. Rep. 435; Cooper *v.* Delavan, 61 Ill. 96.

[3] Hornblower *v.* Duden, (1868) 35 Cal. 664. In State ex rel. Bermudez *v.* Heath, Mayor of New Orleans, (1868) 20 La. Ann. 172; s. c., 96 Am. Dec. 390, the Supreme Court held the right of the city to employ an attorney at law conversant with city affairs to facilitate the collection of debts due the city was unquestionable as long as it infringed on no rights of the city's officers. The court upheld a contract in this case made with one who was assistant city attorney, to collect all bills for taxes assessed on property as unknown, and all unsatisfied judgments in favor of the city for taxes, on the ground that it neither violated the charter of the city nor conflicted with any of the rights of the assistant city attorney, nor did the duties involved in the contract embrace any of the duties or include any of the emoluments of the office of assistant attorney.

[4] Franklin County *v.* Layman, 145 Ill. 138; s. c., 33 N. E. Rep. 1094, affirming 43 Ill. App. 163.

[5] Ibid.

§ 53. Contracts for legal services — how made.—The common council of a city in Indiana is vested with the power to employ counsel to assist the city attorney to protect the interests of the city; but the contract of employment must be made directly or through an authorized agency.[1] The common council of a city being empowered by its charter to employ counsel cannot delegate this power to the mayor, and any contract made by the mayor with an attorney to act for the city will be void.[2] This power by ordinance to select an attorney for a city conferred upon the common council is a trust created for a public purpose, not assignable at the will of the trustee.[3] The Court of Errors and Appeals for New Jersey has held that the corporate authorities of one of the cities of that state, under the provisions of its charter, had the power to employ associate counsel in defending suits against the corporation or in which the city was interested; and that the board of aldermen were sole judges of the necessity of such employment in any particular case, and the exercise of their discretion in such a matter was not reviewable in that court.[4] The authorities of the city, though under its power to employ associate counsel, were not vested with the right, under the guise of such employment, to withdraw and take out of the hands of the city counsel any particular class or classes of cases and to confide the management of them to others.[5]

§ 54. Where a public corporation is bound for legal services.—An attorney properly employed by a town to perform legal services, being ready and willing to perform the contract, should the proper officers of the town prevent his doing so, will be entitled to recover under the contract.[6] If there is an appeal

[1] Justice *v.* City of Logansport, (1892) 6 Ind. App. 135; s. c., 32 N. E. Rep. 868; City of Logansport *v.* Dykeman, 116 Ind. 15.

[2] City of East St. Louis *v.* Thomas, (1882), 11 Bradw. 283.

[3] Cooley's Const. Lim. 204; City of East St. Louis *v.* Wehrung, 50 Ill. 28; Foss *v.* City of Chicago, 56 Ill. 354; Jenks *v.* Chicago, 56 Ill. 397; L. S. & M. S. Ry. Co. *v.* Chicago, 56 Ill. 454; Jackson Co. *v.* Brush, 77 Ill. 59; Oakland *v.* Carpentier, 13 Cal. 540; Whyte *v.* Mayor, 2 Swan, 364; Darling *v.* St. Paul, 19 Minn. 389; State *v.* Bell, 34 Ohio St. 194; State *v.* Hauser, 63 Ind. 155; Birdsall *v.* Clark, 73 N. Y. 73; Brooklyn *v.* Breslin, 57 N. Y. 591; Ruggles *v.* Collier, 43 Mo. 353.

[4] State, Hoxsey, *v.* Mayor & Aldermen of the City of Paterson, (1878) 40 N. J. Law, 186.

[5] Ibid. See reasoning of the court in Ramson *v.* Mayor, etc., of New York, 24 Barb. 226.

[6] Town of Mt. Vernon *v.* Patton, (1879) 94 Ill. 65.

from the action of a city council while acting as a board of equalization, this being the discharge of a corporate function, and acting as a representative of the city, a city solicitor would be justified in defending its action in the appellate court and for such services would be entitled to compensation, even though neither the service nor the compensation be provided for by ordinance.[1] An attorney employed by a town agent in Vermont in a suit in favor of or against the town is entitled to payment for his services from the town, without an express vote to that effect; and the rule is the same if the town agent, being an attorney, renders professional services for the town.[2] And if a town agent, after the expiration of his term of office, continues the management of suits in which the town is interested, without any objection from, or any express employment by the town or his successor, as town agent, he is entitled to recover of the town for his services after his term of office expires.[3] An officer of a city who has employed counsel in a contest to gain possession of the city's property, in the result of which the city is interested, may compel the city to pay the expenses incurred by him in the matter.[4]

§ 55. **Employment of counsel for the defense of officers.**— Counsel may be employed by a town to defend their police officers in actions for false imprisonment.[5]

[1] Kinnie *v.* City of Waverly, (1876) 42 Iowa, 437.

[2] Langdon *v.* Town of Castleton, (1858) 30 Vt. 285.

[3] Ibid.

[4] Stilwell *v.* Mayor, etc., of N. Y., 19 Abb. Pr. 376.

[5] Roper *v.* Town of Laurinburg, (1884) 90 N. C. 427; s. c., 7 Am. & Eng. Corp. Cas. 130; Babbitt *v.* Savoy, 3 Cush. 530. In Sherman *v.* Carr, 8 R. I. 431, an action of taxpayers to enjoin the payment by the treasurer to the mayor of moneys appropriated by the city council to defray the expenses of a suit brought against the mayor of a city and the constable who acted in his aid for certain acts of theirs in virtue of a power conferred upon the mayor by act of the general assembly of that state, BRADLEY, Ch. J., used this language in support of the judgment denying an injunction: "Is it then one of the usual and ordinary expenses of a city to protect its officers who, while exercising in good faith the functions of their office, have been found by the verdict of a jury to have exceeded the lawful powers of that office and to have trespassed upon the rights of a citizen? If the power to indemnify an officer under these circumstances does not rest in that body who appropriated the money for all the legitimate duties of a municipality within its own province, the various executive officers of a city perform their duties at the peril of an individual responsibility for all their mistakes of law and of

§ 56. Indemnity for expenses of litigation.—A promise on the part of a town to refund money paid by assessors on an illegal assessment of a town tax made by them is a valid contract.[1] An action by selectmen to recover the amount of a judgment for damages and costs recovered against them and paid, and the reasonable expenses of defending the action, paid and incurred by them, would be supported by a vote of the town to indemnify the selectmen against any claim for damages and costs of a certain description which may be legally substantiated against them or either of them.[2] And, on such a vote to indemnify them, the action may be to recover the amount of the judgment against the selectmen for the damages and costs and the fees of counsel and witnesses, and other expenses incurred reasonably and in good faith in defending the action in which the judgment was recovered without proving that the town had notice of the pendency of the action.[3] Money may be appropriated by a town by vote to indemnify its school committee for expenses incurred in defending an action for an alleged libel contained in a report made by them in good faith and in which libel suit judgment has been rendered in their favor.[4] A town, where it has appointed a committee to defend an action against one of its officers, as for instance, a surveyor of highways, on account of the digging of a drain, would be bound by a vote to defray the expenses incurred by such committee in his defense, notwithstanding it were under no previous obligation to indemnify the surveyor, and that the committee were entitled to compensation and indemnity from the town for their services and expenses.[5] A city may and should reimburse a mayor who has successfully resisted a proceeding

fact, however honest and intelligent they may be, and also at the peril of the possible mistakes of a jury naturally jealous of the rights of the citizen when brought in conflict with the exercise of official power. If the officer is thus responsible he will naturally be too cautious, if not timid, in the exercise of his powers which must be frequently exercised for the protection of society, before and not after a thorough investigation of the case in which he is called upon to act. * * * We know of no case in which, while the officer continues to act in behalf of the community, and not in his own behalf, it is held that the community cannot indemnify him."

[1] Nelson *v.* Milford, (1828) 7 Pick. 18.

[2] Hadsell *v.* Inhabitants of Hancock, (1855) 3 Gray, 526.

[3] Ibid.

[4] Fuller *v.* Inhabitants of Groton, (1858) 11 Gray, 340.

[5] Bancroft *v.* Lynnfield, (1836) 18 Pick. 566.

taken in the name of the city against him to compel him to a course of official action deemed by him violative of law and detrimental to the city's interest, where the performance of that duty has involved on his part the disbursement of his own money.[1] Towns may bind themselves by a vote to indemnify a collector of taxes from the costs and expenses of defending actions brought against him for acts done in the performance of his duties. And the town may be bound to the same extent by the selectmen under the provision of the statute relating to towns that they "shall have the ordering and managing of all the prudential affairs of the town."[2]

§ 57. When a corporation is not bound for professional services of an attorney.— An attorney retained by a city to conduct certain litigation until it was concluded, upon an agreement that he was to receive reasonable compensation for his services, being afterwards appointed city counselor, with prescribed duties to perform in the matters of the city involving litigation, the Supreme Court of Michigan has held could not recover on a *quantum meruit* for services in such suit performed after his appointment to the official position, in the absence of any agreement that the business of carrying on the suit, though falling within his official duties, should not be considered as included among the services paid for by the annual salary, but should be compensated for in some other way.[3] A corporation cannot by a suit at law question its own existence, seek to restrain the regular succession of its officers, and to have a decree declaring its charter

[1] Barnert *v.* Mayor & Aldermen of City of Paterson, (1886) 48 N. J. Law, 395; s. c., 6 Atl. Rep. 15; 16 Am. & Eng. Corp. Cas. 131. On the right of a municipal corporation to reimburse its officers in such cases, see State, Lewis, *v.* Freeholders of Hudson, 37 N. J. Law, 254; State, Bradley, *v.* Hammonton, 38 N. J. Law, 430,

[2] Pike *v.* Middleton, (1841) 12 N. H. 278. As to indemnity for expenses in suits in which the town is interested, see Baker *v.* Inhabitants of Windham, (1836) 13 Me. 74. Towns may by a vote bond themselves for expenses of a suit when action is for or against them, and in cases even where the suit is between third parties, if the towns are interested. Briggs *v.* Whipple, (1834) 6 Vt. 95. In Cullen *v.* Town of Carthage, (1885) 103 Ind. 196; s. c., 53 Am. Rep. 504; 14 Am. & Eng. Corp. Cas. 256, the court upheld the power, as an incidental one, of the board of trustees of a town to employ counsel to defend the action brought against the marshal of the town for false imprisonment by one whom he had arrested for violation of law.

[3] City of Detroit *v.* Whittemore, (1873) 27 Mich. 281.

void, and having no power to institute such a suit, its authorities cannot bind it to pay for the services of an attorney in the conduct of the suit.[1] The statute of Arkansas makes provision for an allowance by the County Court in favor of a collector of taxes for reasonable attorneys' fees and other expenses incurred in defending suits brought against him for performing or attempting to perform any duty in reference to the collection of the revenue.[2] But a county is not bound to pay attorneys he may be represented by in an action for injunction against his collection of a tax, under a contract with the collector. He has no power to bind the county to pay such fees. And, in the absence of statutory regulation, he alone is liable in such cases.[3]

§ 58. **The same subject continued.**— A board of county commissioners in Indiana is authorized to employ counsel in matters pertaining to the business of the county, and to give to the members of the board legal advice in relation to their official duties; but they have no power to bind their successors by employing attorneys to act for a period beyond the time when the board will, by operation of law, have to be reorganized.[4] A county is not bound by the expenses for attorney's services incurred by a county collector for resisting objections to his bond.[5] Negotiable drafts drawn by a municipal corporation for

[1] Daniel *v.* Mayor & Aldermen of Memphis, (1851) 11 Humph. 582. In Wallace *v.* Mayor & Common Council of the City of San Jose, (1865) 29 Cal. 180, it was held that there was no power, under the charter of this city, in the mayor and council to enter into a contract by which the city became obligated to pay an attorney at a future time a sum of money, if he succeeded in placing the city in possession of certain real estate, unless there was money in the treasury at the time to pay the same, after paying the expenses of the city government and all other demands legally due. As to this contract creating a debt, see People *v.* Johnson, 6 Cal. 499; Nougues *v.* Douglass, 7 Cal. 65, 69; People ex rel. McCullough *v.* Pacheco, 27 Cal. 175.

[2] Mansf. Dig. Ark. § 5859.

[3] Simmes *v.* Chicot County, (1888) 50 Ark. 566; s. c., 9 S. W. Rep. 308; Fry *v.* Chicot Co., 37 Ark. 117.

[4] Board of Comrs. of Jay County *v.* Taylor, (1889) 123 Ind. 148; s. c., 23 N. E. Rep. 752; 30 Am. & Eng. Corp. Cas. 294.

[5] Fry, Collector, *v.* Chicot County, (1881) 37 Ark. 117. In Baldwin *v.* School City of Logansport, (1881) 73 Ind. 346, where the school trustees of the city made an order authorizing the treasurer of the school board to employ attorneys "to prosecute the county auditor for refusing to pay over moneys belonging to the school fund, and shortly afterward there was elected a new board of school trustees, whereupon the attorneys employed under the order of the former trustees proceeded in the proper court for a

the payment of judgments and costs in actions brought against the supervisors of the county for penalties for an alleged neglect of duty in refusing to audit and allow salaries to associate judges of general sessions of the corporation appointed under an unconstitutional law, have been held in New York to be void upon the ground that the corporation had no right to assume defense of an action to which it was not a party and which it had no interest in resisting.[1]

§ 59. What contracts with attorneys are contrary to public policy.—A contract entered into by the authorities of a city, with an attorney who had been under the employment of the city in a litigation to protect its rights in certain property and franchises, under a former contract, which by its terms is irrevocable and binds the city for additional compensation to such attorney in the form of a large proportion of the city's receipts, as, for instance, from the use of a ferry by the public, is beyond the power of such authorities; is contrary to public policy.[2]

§ 60. Limitations upon the indebtedness to be incurred.—By a statute of Massachusetts one of its cities, for the purpose of supplying pure water to its citizens, after providing for condemnation of lands, etc., and the appointment of commissioners to execute the work, was authorized through its city council "for the purpose of defraying the cost" of whatever lands were so

mandate to the auditor, etc., the object of the suit being to determine who were the legal school trustees, it was held that the order of the school trustees above mentioned did not authorize the employment of the attorneys to bring a civil suit to try the question as to who were the legal trustees, and the school city was not liable for the fees of the attorneys for such services.

[1] Halstead *v.* Mayor, etc., of New York, 3 N. Y. 430, affg. 5 Barb. 218.

[2] Waterbury *v.* City of Laredo, (1887) 68 Tex. 565; s. c., 20 Am. & Eng. Corp. Cas. 186. It was said by the court: "Such a contract, if valid, certainly would divest the municipal government of the discretion conferred upon it — a discretion necessarily legislative in character, which such a body cannot surrender by contract or bind itself not to exercise freely whenever it may become necessary." Waterbury *v.* City of Laredo, 60 Tex. 522; Laredo *v.* Macdonnell, 52 Tex. 520; Laredo *v.* Martin, 52 Tex. 559. In Board of Comrs. of Jay County *v.* Taylor, (1889) 123 Ind. 148; s. c., 23 N. E. Rep. 752; 30 Am. & Eng. Corp. Cas. 294, a contract entered into between the board of commissioners and certain attorneys, by which the board employed these attorneys to act as county attorneys for a period of three years from a date named in the contract, was held to be void as contrary to public policy.

condemned, and of completing the works and paying all expenses incident to the accomplishment of the main purpose "to issue scrip to an amount not exceeding in the whole five hundred thousand dollars." The Supreme Court of Judicature of that state construed this act not to restrict the city in the amount of expenditures which they might make for the accomplishment of the purpose of the act, but only in the amount of permanent debt which they might create.[1] The provision in the charter of a city that the council "shall not borrow for general purposes more than fifty thousand dollars," the Supreme Court of the United States has held did not limit the debt of the city, nor prohibit the council from entering into a contract involving an expenditure exceeding that amount for special improvements, such as the grading and paving of streets and the construction of sidewalks, which were authorized by its charter.[2] The effect of

[1] Foote *v.* City of Salem, (1867) 14 Allen, 87. Bigelow, Ch. J., said: "It is a restriction on the authority of the city to create a permanent debt, payable at a distant period of time, but not a limitation on their powers to raise money by taxation or temporary loans in order to carry forward and execute the works which, by the previous provisions of the act, they were in the broadest terms empowered to construct. * * * If construed as an absolute condition or limitation on the authority of the city, no steps could be safely taken to execute the authority conferred, unless it had been previously ascertained that the expenditure to be incurred would not exceed the prescribed sum. But it is obvious that this would be clearly impracticable in relation to an enterprise of the character contemplated by the statute."

[2] Hitchcock *v.* Galveston, (1877) 96 U. S. 341, holding further that the contract was not rendered wholly inoperative because it provided that the work done under the contract should be paid for in bonds of the corporation, the issue of which bonds was unauthorized by law. The contract, so far as it was in other respects lawful, remained in force, and for the breach of the same the corporation was liable. See as to this last point: Tracy *v.* Talmage, 14 N. Y. 162; Curtis *v.* Leavitt, 15 N. Y. 9; Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Argenti *v.* City of San Francisco, 16 Cal. 255; Maher *v.* City of Chicago, 38 Ill. 266; City of Chicago *v.* The People, 48 Ill. 416. In The State Board of Agriculture *v.* Citizens' Street Railway Co., 47 Ind. 407, it was held that although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract. See, substantially to the same effect, Allegheny City *v.* McClurkan, 14 Penn. St. 81; Silver Lake Bank *v.* North, 4 Johns. Ch. 370. As to the rule in the text, see Cumming *v.* Brooklyn, 11 Paige, 596; Allen *v.* City of Janesville, 35 Wis. 403; Argenti *v.* City of San Francisco, 16 Cal. 255.

charter provisions of a city prohibiting the creation of municipal liabilities in any one year exceeding the amount to be raised by tax and providing that payments on a municipal contract shall be made from sums raised by tax for the year for which such contract is made, is to forbid the creation of future responsibility for annual current expenses.[1] The provisions in the statute of Iowa declare that it is competent for any city authorized by that statute to levy a tax to pay for the paving of street and alley intersections "to anticipate the collection thereof by borrowing money, and pledging such tax, whether levied or not, for the payment of the money so borrowed." The Supreme Court of that state has held that there was no limitation upon the city as to the amount of the work of the kind contemplated it might do in a single year except the limitation in the Constitution as to the indebtedness it might contract, and that the provision above referred to did not limit the city in making the loan provided for to the amount of tax which would accrue under a levy for a single year, but that it was empowered to pledge the tax to any extent necessary to enable it to meet such indebtedness as it might lawfully incur in a single year, and to levy a tax for successive years for that purpose.[2]

§ 61. **The same subject continued.**— The indebtedness of a school district having exceeded that allowed by the constitutional limitation, should its directors contract an indebtedness with other

[1] Putnam *v.* City of Grand Rapids, (1885) 58 Mich. 416; s. c., 25 N. W. Rep. 330; City of Springfield *v.* Edwards, 84 Ill. 626; Law *v.* People, 87 Ill. 385; Fuller *v.* City of Chicago, 89 Ill. 282; Howell *v.* City of Peoria, 90 Ill. 104; New Orleans *v.* Clark, 95 U. S. 644, 652; French *v.* City of Burlington, 42 Iowa, 614; National State Bank *v.* Independent District, 39 Iowa, 490; McPherson *v.* Foster, 43 Iowa, 48; City of Council Bluffs *v.* Stewart, 51 Iowa, 385; Scott *v.* City of Davenport, 34 Iowa, 208; Mosher *v.* Independent School District, 44 Iowa, 122; East St. Louis *v.* People, 6 Bradw. 76; Buchanan *v.* Litchfield, 102 U. S. 278.

[2] Coggeshall *v.* City of Des Moines, (1889) 78 Iowa, 235; s. c., 41 N. W. Rep. 617; 42 N. W. Rep. 650. A contract entered into by a city with a water works company to furnish water to the city for an annual sum has been held not to be in violation of a law that the council of the city shall contract no debt on its part which shall not be payable within the fiscal year in which it was contracted, and which cannot be discharged from the income of such year, as the compensation for each year's service of the company under the contract in question was payable in that year and each year's indebtedness was only for the water furnished in that year. Utica Water Works Co. *v.* City of Utica, (1884) 31 Hun, 426.

persons, and afterwards, through collusion with those other persons, permit them to obtain judgment for such indebtedness against the school district, the judgment would be of no validity against the district, and could not be enforced.[1] The limitation of the indebtedness which may be incurred by a county of the territory of Utah, as fixed by the act of congress with reference to territories and the territorial legislature, is the amount of the income and revenue of the county for the two years just preceding the incurring of the indebtedness, and the Supreme Court of the territory has held county warrants, issued for indebtedness beyond that amount, to be void and unauthorized.[2]

[1] Kane *v.* Independent School Dist. of Rock Rapids, (1891), 82 Iowa, 5; s. c., 47 N. W. Rep. 1076.

[2] Fenton *v.* Blair, (Utah, 1895) 39 Pac. Rep. 485. In Butts *v.* Little, (1881) 68 Ga. 272, the Supreme Court of Georgia held that for a county to contract for the erection of a public building at a specified price, which was to be completed by a certain date, and payment for which was to be made as the work progressed, on estimates to be made by certain architects, less fifteen per cent, was in effect a contract to pay the price agreed on by the day of the date of completion fixed; and the amount being more than could constitutionally be raised by taxation without authority of the voters exhibited by an election, was to incur a debt not authorized by the Constitution. See Spann *v.* Webster County, 64 Ga. 498, 500; Hudson *v.* Marietta, 64 Ga. 286. As to the effect of limitation upon the power to create indebtedness, see Murphy *v.* East Portland, 42 Fed. Rep. 308; Lott *v.* Mayor, etc., of City of Waycross, 84 Ga. 681; s. c., 11 S. E. Rep. 558; Dehm v. City of Havana, 28 Ill. App. 520; Clark *v.* Columbus, 23 Wkly. Law Bull. 289; Coggeshall v. City of Des Moines, 78 Iowa, 235; s. c., 41 N. W. Rep. 617. In Cabaniss *v.* Hill, (1885) 74 Ga. 845, a contract for certain iron doors, cells, pipes for sewers, etc., furnished a county under a contract which provided that the contractors agreed "to take and receipt the sum of $3,510 in warrants on county treasurer, payable on December 25, 1884, and bearing eight per cent interest after that date until paid in full, in payment for said cells and wrought iron works," for which, at the November term of the Court of Ordinary orders were issued to "pay out of any money now being collected for new jail fund," was held to create a new debt, and that it was in violation of the Constitution of the state. Rogers *v.* Board of Comrs. Le Sueur County, (Minn.) 59 N. W. Rep. 488; Hunt *v.* Fawcett, 8 Wash. 396; s. c., 36 Pac. Rep. 318; Hockaday v. Comrs., 1 Colo. App. 362; Barnard *v.* Knox County, 105 Mo. 382; s. c., 16 S. W. Rep. 917, overruling Potter *v.* Douglas Co., 87 Mo. 240; Bonnell *v.* County of Nuckolls, 32 Neb. 189; s. c., 49 N. W. Rep. 225, affirming Bonnell *v.* Nuckolls County, 28 Neb. 90; s. c., 43 N. W. Rep. 1145; Baird *v.* Todd, 27 Neb. 782; Spilman *v.* City of Parkersburg, 35 W. Va. 605; s. c., 14 S. E. Rep. 279; Hockaday *v.* Board of County Comrs., (Colo. App.) 29 Pac. Rep. 287; Nolan County *v.* State, 83 Tex. 182; s. c., 17 S. W. Rep. 823; People *v.* Hamill, 134 Ill. 666; s. c., 29 N. E. Rep. 280; Rehmke *v.* Goodwin, 2 Wash. St. 676; s. c., 27

§ 62. Limitations upon power to incur indebtedness—procuring a supply of water.—Where the common council of a city was prohibited by the charter from contracting debts or incurring liabilities exceeding in any one year the revenue for such year unless authorized by a majority vote of the electors of the city, the Supreme Court of Michigan held that a contract made by the common council without such a vote for the use of at least fifty water hydrants per year at fifty dollars each for a term of thirty years, created a liability against the city to the full extent of the thirty years' rental, which aggregate liability being in excess of the revenue which could be legally raised in any one year, the contract was void.[1]

Pac. Rep. 473; Mayor, etc., of Rome *v.* McWilliams, (1881) 67 Ga. 106; State ex rel. Vandiver *v.* Tolly, (S. C., 1892) 16 S. E. Rep. 195; Childs *v.* City of Anacortes, (1892) 5 Wash. St. 452; s. c., 32 Pac. Rep. 217.

[1] Niles Water Works *v.* Mayor, etc., of the City of Niles, (1886) 59 Mich. 311; s. c., 26 N. W. Rep. 525; 11 Am. & Eng. Corp. Cas. 299. In Davenport *v.* Kleinschmidt, (1887) 6 Mont. 502; s. c., 16 Am. & Eng. Corp. Cas. 301, where the bonded indebtedness of a city was $19,500 and the floating indebtedness over $15,000, a contract bonding the city to take water from a contractor at an annual rent of $15,000 was held to be in violation of a provision in the charter of the city limiting the power of the city council "to incur any indebtedness on behalf of said city for any purpose whatever to exceed the sum of $20,000, as such contract created an indebtedness within the meaning of this limitation. See on this subject Burlington Water Co. *v.* Woodward, 49 Iowa, 58, 61; Grant *v.* City of Davenport, 36 Iowa, 396, 401; Sackett *v.* City New Albany, 88 Ind. 473; s. c., 45 Am. Rep. 472; Prince *v.* City of Quincy, 105 Ill. 138, 142; State *v.* Mayor, 23 La. Ann. 358; Smith *v.* Inhabitants of Dedham, (1887) 144 Mass. 177; s. c., 10 N. E. Rep. 782. That towns having power to provide for the purchase and maintenance of fire engines for the extinguishment of fires have the incidental power to make provision, by reservoirs or other means, for a supply of water, without which the engines would be useless, see Hardy *v.* Waltham, 3 Met. 163. In Salem Water Co. *v.* City of Salem, 5 Oreg. 30, it was held that an agreement by the city to pay the water company $1,800 per annum for seventeen years in quarterly installments for water to be furnished the city without any provision for raising and appropriating revenue to be applied in payment for such liabilities as they became due, necessarily created a liability within the meaning of the act of incorporation of the city which prohibited the city from creating "any debt or liabilities in any manner" against the city which should exceed the sum of $1,000; and that the contract was void. The court reviewed the following cases pertinent to this ruling: State of California *v.* McCauley, 15 Cal. 429; People ex rel. McCauley *v.* Brooks, 16 Cal. 11, 24; Koppikus *v.* State Capitol Commissioners, 16 Cal. 249, 253; State *v.* Medbery, 7 Ohio St. 526; People *v.* Pacheco, 27 Cal. 175; Coulson *v.* City of Portland, 1 Deady, 481.

§ 63. **The same subject continued.**—Power conferred upon cities by statute "to construct, maintain and operate water works" does not, expressly or impliedly, deprive such cities of their pre-existing and co-existing power and right to "authorize any incorporated company or association to construct such works" for furnishing the city with wholesome water.[1] The Indiana Supreme Court, in a later case involving a contract with a water company, has held that although the power of a city to contract for a supply of water for public use, be, in a general sense, a discretionary one, it cannot be so exercised as to create a corporate debt beyond that limited by law, nor to surrender or suspend legislative power.[2] A city vested by the terms of its charter with "full power and authority to make such assessments on the inhabitants of the city, or those who hold taxable property therein, for the safety, benefit, convenience and advantage of said city, as shall appear to them expedient" may make an assessment

[1] City of Vincennes *v.* Callender, (1882) 86 Ind. 484, sustaining a contract of the city with a water company to supply water as not *ultra vires.*

[2] City of Valparaiso *v.* Gardner, (1884) 97 Ind. 1. As to the contract in this case, it was generally said by ELLIOTT, Ch. J.: "We have no doubt that the corporation had authority to contract for a supply of water for a period of twenty years, and that the contract cannot be overthrown solely on the ground that it is a surrender of legislative power. There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water and the like, is neither a judicial nor a legislative power, but is a purely business power. The question is, however, so firmly settled by authority that we deem it unnecessary to further discuss it. City of Indianapolis *v.* Indianapolis, etc., Co., 66 Ind. 396; Dill. on Mun. Corp. §§ 473, 474, and authorities cited." Upon the question of the restriction upon the city stated in the text and as to what constitutes a "debt" or "indebtedness," under the constitutional provisions of various states, the Indiana court refer to and comment upon the following cases: Sackett *v.* City of New Albany, 88 Ind. 473; Lowber *v.* Mayor, etc., 5 Abb. Pr. 325; Clarke *v.* City of Rochester, 24 Barb. 446; Weston *v.* City of Syracuse, 17 N. Y. 110; Garrison *v.* Howe, 17 N. Y. 458; Wentworth *v.* Whittemore, 1 Mass. 471; People *v.* Arguello, 37 Cal. 524; East St. Louis *v.* East St. Louis, etc., 98 Ill. 415; Prince *v.* City of Quincy, 105 Ill. 138; s. c., 44 Am. Rep. 785; Dively *v.* City of Cedar Falls, 27 Iowa, 227. Approved of in 1 Dill. on Mun. Corp. (3d ed.) § 135; Grant *v.* City of Davenport, 36 Iowa, 396; French *v.* City of Burlington, 42 Iowa, 614; Burlington Water Co. *v.* Woodward, 49 Iowa, 58; Scott County *v.* City of Davenport, 34 Iowa, 208; State *v.* McCauley, 15 Cal. 429; People *v.* Pacheco, 27 Cal. 175; Coulson *v.* City of Portland, Deady, 481; Coy *v.* City Council, 17 Iowa, 1; Coffin *v.* City Council, 26 Iowa, 515.

on the value of the real estate within the corporate limits of the city, through its city council, for the purpose of constructing a canal for the better securing a supply of water for the city.[1] A municipal corporation may under legislative grant of power, to make all contracts in its corporate capacity which may be deemed necessary for the welfare of the corporation, make a contract for the construction of water works.[2] Under the statute entitled "An act to enable cities to supply the inhabitants thereof with pure and wholesome water,"[3] a city is authorized to contract for a supply of water for public and private use.[4]

§ 64. Donation of bonds to aid in developing water power. —A municipal corporation, the charter of which authorizes it "to borrow money on the credit of the city and to issue bonds therefor," and which, under a special statute, is authorized to borrow a sum named "to be expended in developing the natural advantages of the city for manufacturing purposes," has no authority, under the grants of power above stated, to issue bonds by way of donation to an individual to aid in developing the water power of the city, and is not liable to an action upon such bonds by one who takes them with notice of the facts.[5]

[1] Frederick *v.* City Council of Augusta, (1848) 5 Ga. 561. This canal was constructed for procuring a better supply of water and for manufacturing purposes.

[2] Mayor & Council of Rome *v.* Cabot, (1859) 28 Ga. 50.

[3] Pub. Laws N. J. (1876), 366.

[4] Hackensack Water Co. *v.* City of Hoboken, 51 N. J. Law, 220; s. c., 17 Atl. Rep. 307. As to contracting for water supply, see City of Grand Rapids *v.* Hydraulic Co., 66 Mich. 606; s. c., 33 N. W. Rep. 749; Adrian Water Works *v.* City of Adrian, 64 Mich. 584; s. c., 31 N. W. Rep. 529; Culbertson *v.* City of Fulton, 127 Ill. 30; s. c., 18 N. E. Rep. 781; Atlantic City Water Works Co. *v.* Read, 50 N. J. Law, 665; s. c., 15 Atl. Rep. 10.

[5] Ottawa *v.* Carey, (1883) 108 U. S. 110; s. c., 2 Sup. Ct. Rep. 361. The court distinguished Hackett *v.* Ottawa, 99 U. S. 86, and Ottawa *v.* National Bank of Portsmouth, 105 U. S. 342, involving bonds of the same issue, where it was held in substance that, as there was legislative authority to issue bonds for municipal purposes, and it was recited in the bonds then sued on that they were issued for such purposes, the city was estopped from proving, as against *bona fide* holders, that the recitals were untrue; and as the plaintiffs in those cases had no knowledge of the precise purposes for which the bonds were issued, they had the right to rely on what was recited. The parties here suing did know the purpose for which they were issued. These bonds being Illinois contracts, WAITE, Ch. J., referred to these cases: Taylor *v.* Thompson, 42 Ill. 9; Chicago, Danville & Vincennes R. R. Co. *v.* Smith, 62 Ill. 268; The People *v.* Dupuyt, 71 Ill. 651; Burr *v.* City of Carbondale, 76 Ill. 455; People *v.* Trustees

of Schools, 78 Ill. 136; Quincy, Missouri & Pacific R. R. Co. *v.* Morris, 84 Ill. 410; Supervisor, etc., of Hensley Township *v.* The People, 84 Ill. 644, as to what might be held to be a corporate purpose. The chief justice then used this language as to the case before the court: "As power in a municipal corporation to borrow money and issue bonds therefor implies power to levy a tax for the payment of the obligation that is incurred, unless the contrary clearly appears (Ralls County Court *v.* The United States, 105 U. S. 733), it follows that the power contained in the charter to borrow money did not authorize the issue of the bonds in this case, unless they were issued for a corporate purpose, there being a constitutional prohibition against taxation by the city, except for corporate purposes. * * * The charter confers all the powers usually granted for the purposes of local government, but that has never been supposed of itself to authorize taxes for every thing which, in the opinion of the city authorities, would 'promote the general prosperity and welfare of the municipality.' Undoubtedly the developments of the water power in the rivers that traverse the city would add to the commerce and wealth of the citizens, but certainly power to govern the city does not imply power to expend the public money to make the water in this river available for manufacturing purposes. It is because railroads are supposed to add to the general prosperity that municipalities are given power to aid in their construction by subscriptions to capital stock or donations to the corporations engaged in their construction; but in all the vast number of cases involving subscriptions and donations that have come before this court for adjudication since The Commissioners of Knox County *v.* Aspinwall, decided twenty-five years ago and reported in 21 How. 539, it has never been supposed that the power to govern, of itself, implied power to make such subscriptions or such donations. On the contrary, it has been over and over again held, and as often as the question was presented, that unless the specific power was granted, all such subscriptions and all such donations, as well as the corporation bonds issued for their payment, were absolutely void, even as against *bona fide* holders of the bonds. Thomson *v.* Lee County, 3 Wall. 327; Marsh *v.* Fulton County, 10 Wall. 676; St. Joseph Township *v.* Rogers, 16 Wall. 644; McClure *v.* Township of Oxford, 94 U. S. 429; Wells *v.* Supervisors, 102 U. S. 625; Allen *v.* Louisiana, 103 U. S. 80."

CHAPTER II.

GENERAL POWER TO INCUR PECUNIARY LIABILITY — PRIVATE CORPORATIONS.

§ 65. **General rules as to incurring indebtedness.**— Within the scope of its general and discretionary powers, the authority of a corporation to dispose of its funds for any purpose whatever may be admitted to be absolute and beyond all control.[1] It is always presumed that a corporate body may make any proper contracts, the scope and tendency of which are manifestly to forward the design of its legislative creation.[2] Such corporations, if not restricted by their charters, have incidental authority to borrow money for any of their lawful purposes.[3] But the power to borrow money, being an incidental power, does not extend

[1] Binney's Case, (1829) 2 Bland's Ch. 99, 142.

[2] Kitchen *v.* Cape Girardeau & State Line R. R. Co., (1876) 59 Mo. 514, an action to recover for services as an agent under employment to perform services consonant to the general design of the corporation.

[3] Partridge *v.* Badger, 25 Barb. 146.

beyond cases where it is essential to the transaction of its ordinary affairs.[1] The limit fixed in the charter of a corporation as to its capital does not restrict its power to contract debts for the purpose of the incorporation as to their amount, nor as to the amount of property it may purchase or accumulate.[2] A private corporation has been held liable, at least to the extent of the consideration received, for indebtedness assumed to be contracted in excess of the limit imposed by the articles of incorporation.[3] A corporation, created with authority to construct a certain road and collect toll thereon, may purchase a like road already constructed, and charge toll thereon.[4] A corporation organized under a state corporation act which authorizes the formation of a corporation to engage "in any lawful enterprise, business, pursuit or occupation," has power to buy and sell or lease a railway.[5] There is an implied power in a corporation empowered to construct a work to borrow money necessary for the purpose of such construction, and to issue its bonds for the money borrowed.[6] A corporation authorized by the general law under which it is incorporated to borrow money for the purpose of constructing its works, and to issue bonds for its payment, has the power to purchase works already constructed and suitable for its purposes, and issue bonds in payment for such works.[7] In such a case, the corporation may issue stock for a portion of the purchase money of such works, and pay in cash or issue bonds for the balance.[8]

[1] Beers *v.* Phœnix Glass Co., 14 Barb. 358.

[2] Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280.

[3] Humphrey *v.* Patrons' Mercantile Association, (1879) 50 Iowa, 607. The New York Court of Appeals has sustained the validity of a contract of a private corporation for proper and necessary work preliminary to active business operations, as within its incidental power to make any contract necessary to advance the object for which it was created. Legrand *v.* Manhattan Mercantile Association, (1880) 80 N. Y. 638, affirming 44 N. Y. Super. Ct. 562. See Broughton *v.* M. Water Works, 3 B. & A. 1; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Straus & Bro. *v.* Eagle Ins. Co. of Cincinnati, 5 Ohio St. 59.

[4] State ex rel. *v.* Hannibal, etc., Road Co., (1889) 37 Mo. App. 496.

[5] Oregonian Ry. Co. *v.* Oregon Ry. & Navigation Co., 23 Fed. Rep. 232.

[6] Smith *v.* Law, 21 N. Y. 296.

[7] Gamble *v.* Queens County Water Co., (1890) 25 Abb. N. C. 410, reversing 52 Hun, 166.

[8] Ibid. As to legislature's power to authorize corporations of its creation to borrow money, etc., see Covington *v.* C., etc., Bridge Co., (1873) 10 Bush, 74. As to power to borrow money, see Union M. Co. *v.* Rocky Mt. Nat. Bank, 2 Col. 248; Beers *v.* Phœnix Glass Co., 14 Barb. 358; Mead *v.* Keeler, 24 Barb. 20. As to raising

A corporation, with power to borrow money, may legitimately borrow promissory notes upon which to raise money for its business.[1]

§ 66. Purchase of property.— By the common law corporations have a right to purchase and hold property so far as may be necessary to carry into execution the purposes and objects for which they are created.[2] A corporation incorporated under the general laws of Alabama, has power to borrow money to purchase and improve real estate that it may be enabled to carry into effect the purposes of its incorporation.[3] The Iowa Supreme Court has held that a corporation authorized by its charter to purchase, etc., "any real estate or other property *deemed* advisable in the transaction of its business" might purchase its own

money for the purpose of carrying out the purposes of its creation, see Wellersburg, etc., Co. *v.* Young, 12 Md. 476; Mayor, etc., of Baltimore *v.* Baltimore & Ohio R. R. Co., 21 Md. 91. As to the means employed to carry out such purposes, coming within the implied powers of corporations, see Willmarth *v.* Crawford, 10 Wend. 342; Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 5 Wis. 173; Clark *v.* Farrington, 11 Wis. 306. As to these implied powers being performed by their agents, see Smith *v.* Eureka Flour Mills, 6 Cal. 1; Straus & Bro. *v.* Eagle Ins. Co., 5 Ohio St. 59. As to making promissory notes under the implied power, see Moss *v.* Oakley, 2 Hill, 265; Munn *v.* Commission Co., 15 Johns. 44; Mott *v.* Hicks, 1 Cow. 513; Auerbach *v.* Le Sueur Mill Co., (1881) 28 Minn. 291; s. c., 9 N. W. Rep. 799; Sullivan *v.* Murphy, 23 Minn. 6; Chaska Company *v.* Board of Supervisors of Carver Co., 6 Minn. 204.

[1] Holbrook *v.* Basset, 5 Bosw. 147.

[2] Blanchard's Gun-Stock Turning Factory *v.* Warner, (1848) 1 Blatchf. 258.

[3] Alabama Gold Life Ins. Co. *v.* Central Agricultural & Mechanical Association, (1875) 54 Ala. 73. *Arguendo* it was said by BRICKELL, Ch. J: "The general principle is that a corporation can make no contracts, and do no acts, except such as are authorized by its charter. From the charter it derives all its powers, and the capacity of exercising them. Any contract made by it not necessary and proper, directly or indirectly, to enable it to answer the purpose of its creation, is void, and neither a court of law or of equity can enforce it. Grand Lodge *v.* Waddill, 36 Ala. 313; Smith *v.* Ala. Life Ins. & Trust Co., 4 Ala. 558; City Council *v.* Montgomery & Wetumpka Plank Road, 31 Ala. 76. It must not be understood, however, that the charter, whether it is of special legislative enactment, or derived from general statutory provisions, must expressly confer the power of making contracts. As we have said, the capacity to contract is an incidental corporate power, and if the special act of incorporation, or the general statutory law is silent as to the contracts into which a corporation may enter, it has the power to make all such contracts as are necessary and proper to enable it to accomplish the purposes of its creation. Ang. & Ames on Corp.

stock.[1] Upon evidence that it was customary and necessary, in the economical conduct of the business of iron furnaces to conduct a supply store in connection therewith, the Supreme Court of Tennessee has held that debts created in the purchase of a stock of goods for such store were valid obligations of the furnace company. The power to conduct such a store being clearly inci-

§ 271. This is the theory on which the general statutes for the organization of private corporations proceed, for though the powers of such corporation are enumerated, that of making contracts is not included, but is left to implication from the powers mentioned, and the character and purposes of the corporation. It is not indispensable, therefore, to the validity of a contract made by a corporation for money borrowed, that the power to borrow money should be expressly conferred. Ang. & Ames on Corp. § 257. If the nature and character of the corporation render the power a usual and proper mode of accomplishing its objects and purposes, the power is incidental or implied. When the corporation has, as all private corporations have, under the general law providing for their creation, the capacity of acquiring and holding personal and real property, the mode of acquiring not being limited, they may acquire it by purchase or by gift. The corporation has the capacity of an individual in this respect, within the scope of its legitimate objects and purposes. Having the power to acquire and hold personal and real estate by purchase, it has, as an incident, the power to borrow money to make the purchase. The exercise of such power may be advantageous and useful, enabling the corporation, the owner, to put its powers into active exercise, and to acquire the necessary property on terms more profitable to its stockholders. It would scarcely be affirmed that the power to acquire and hold real and personal estate must be so narrowed that the corporation could not contract a debt for its purchase — that at the very moment of the purchase and conveyance the purchase money must be counted out or the purchase and conveyance is void. If the necessities and interests of the corporation require it, which must be determined by those having charge of its affairs, and intrusted with the power and duty, that a debt be contracted in the acquisition of the necessary property, the power to contract it cannot be denied. If more advantageous to borrow the money and make immediate payment than to contract the debt for the purchase money with the vendor, the contract is equally within the scope of corporate power and valid." Fay *v.* Noble, 12 Cush. 1; Davis *v.* Proprietors of Meeting House, 8 Met. 321; Union Bank *v.* Jacobs, 6 Humph. 515; Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280; Burr *v.* McDonald, 3 Gratt. 215; Curtis *v.* Leavitt, 15 N. Y. 9; Bradley *v.* Ballard, (1870) 55 Ill. 413; Mead *v.* Keeler, (1857) 24 Barb. 20; Partridge *v.* Badger, (1857) 25 Barb. 146; Clark *v.* Titcomb, (1864) 42 Barb. 122; Life & Fire Ins. Co. *v.* Mechanic Fire Ins. Co., (1831) 7 Wend. 31; Barnes *v.* Ontario Bank, (1859) 19 N. Y. 152; Smith *v.* Law, (1860) 21 N. Y. 296; Ridgway *v.* Farmers' Bank of Bucks Co., (1825) 12 Serg. & R. 256; Hamilton *v.* Newcastle & Danville R. R. Co., (1857) 9 Ind. 359; Rockwell *v.* Elkhorn Bank, (1861) 13 Wis. 653.

[1] Iowa Lumber Co. *v.* Foster, (1878) 49 Iowa, 25. As supporting this doctrine, see Barton *v.* P. J. & U. F.

dental to the business of making iron, was, therefore, within the corporate powers of the company, though not mentioned in the charter.[1]

§ 67. Aiding other corporations.— An act of the legislature of New York authorizing the several railroad corporations of that state to subscribe to the capital stock of a railroad company designed to penetrate the western country has been held to be constitutional and valid.[2] The Supreme Court of Nevada has held a contract by a mining corporation to advance a specific sum of money to aid in the construction of a tunnel to drain its mine not to be *ultra vires*, and that such a contract came within the incidental and implied powers of a mining company.[3] Notwithstanding the Code of Oregon in one place provides that "persons" shall be construed to include a corporation, the authority granted under the same Code to two or more "persons" to form a corporation in a certain manner does not empower a corporation to become a subscriber to shares in another corporation.[4] The Court of Appeals of Maryland has sustained the power of one steamboat company to purchase shares of stock in another.[5] A

Plank Road Co., 17 Barb. 397; Cooper *v.* Frederick, 9 Ala. 738; Verplanck *v.* Mer. Ins. Co., 1 Edw. Ch. 84; Hartridge *v.* Rockwell, R. M. Charlton, 260; Gillet *v.* Moody, 3 Comst. 479; Taylor *v.* Miami Exporting Co., 6 Ohio, 176; State Bank *v.* Fox, 3 Blatchf. 431; City Bank of Columbus *v.* Bruce, 17 N. Y. 507.

[1] Searight *v.* Payne, 6 Lea, 283.

[2] White *v.* Syracuse & Utica R. R. Co., (1853) 14 Barb. 559.

[3] Sutro Tunnel Co. *v.* Segregated Belcher Mining Co., 19 Nev. 121; s. c., 7 Pac. Rep. 271.

[4] Denny Hotel Co. of Seattle *v.* Schram, (Wash.) 32 Pac. Rep. 1002.

[5] Booth *v.* Robinson, (1880) 55 Md. 419. It was said by the court: "This [purchase and holding of this stock], it is contended, by the plaintiffs, could not be done without express authority by law. But, while some courts have so held, the great weight of authority is the other way. There is nothing in the charter of the steam packet company or in the nature of its business that would, in the slightest manner, forbid the exercise of such power, and having money to loan or invest, there would appear to be no good reason why it might not invest in the stock of other corporations as well as in any other funds, provided it be done *bona fide* and with no sinister or unlawful purpose. The courts of England at one time strongly opposed the rights of one corporation to deal or invest in the stock of another corporation without express authority for so doing, but that opposition has been entirely overcome and it is now settled there that one corporation may deal in the shares of another, without express authority so to do, unless where expressly prohibited or the nature of its business render it improper so to deal. Re Barned's Banking Co., L. R., 3 Ch. 105; Re Asiatic Banking Co., L. R., 4 Ch. 252. In the latter of the cases first

joint stock corporation organized "to do a general insurance agency commission and brokerage business and such other things as are incidental to and necessary in the management of that business," has been held in Connecticut to have no power to subscribe to the stock of a savings bank and building and loan association.[1] Though the power to borrow money may be implied in such a corporation, it cannot legally subscribe to such stock as a means of effecting a loan or money.[2] The power of an agricultural society to subscribe to stock in a street railway company which was to construct a street railroad through the streets of the city to the grounds of the society and to borrow money, secure it by assigning certain promissory notes of the railroad company and mortgage to secure them and to guarantee such notes in order to effectuate the purposes of the society, has been sustained by the Iowa Supreme Court.[3]

§ 68. **Contracts of suretyship.**— The Louisiana Supreme Court has held that there was no express authority given to the officers of the corporation involved in this case to enter into a contract of suretyship; neither was there any general authority

cited, Lord Justice SELWYN, in speaking of this power of corporations, said: "As to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord CAIRNS in the case of Barned's Banking Co., viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company so to do having regard to its own constitution, as defined by its memorandum and articles." It is in accordance with the statutes that the law is laid down as settled by Brice in his work on *Ultra Vires*, pp. 91, 92. And in this state the same principle has been fully sanctioned in the case of Elysville Manuf. Co. v. Okisko Co., 1 Md. Ch. Dec. 392, and same case affirmed on appeal in 5 Md. 152.

[1] Mechanics & Workingmen's Mutual Savings Bank & Building Association of New Haven *v.* Meriden Agency Co., (1855) 24 Conn. 159.

[2] Ibid. That a municipal corporation may be bound by a subscription to stock not authorized by its charter by subsequent legislative sanction, see First Municipality *v.* Orleans Theatre Co., 2 Rob. (La.) 209. In New Orleans, Florida & Havana Steamship Co. *v.* Ocean Dry Dock Co., (1876) 28 La. Ann. 173, the Louisiana Supreme Court held that the dock company could not subscribe to the capital stock of the navigation company, this being foreign to the object of its own charter. Purchasing stock of another company. Salomons *v.* Laing, 12 Beav. 339.

[3] Thompson *v.* Lambert, (1876) 44 Iowa, 239.

from which the power to enter into such a contract could be implied or fairly deduced under a plea of usage, necessity, convenience or public interest.[1] A corporation cannot by its officers execute a note for a debt due from a third person to another, having no relation to its business.[2] A manufacturing corporation, organized under the general laws of New York, has no power to indorse for the accommodation of another paper in which it is not interested.[3] And the indorsement of such paper by the treasurer of a manufacturing corporation may be presumed to be *ultra vires*.[4] But this rule has been adhered to, that while a corporation has no right to bind itself by an accommodation acceptance or indorsement, the corporation is liable on such acceptance or indorsement to a *bona fide* holder, although it was made for a purpose or at a place not authorized by the charter of the corporation.[5]

§ 69. Guaranty of bonds of one railroad corporation by another.— Upon a sufficient consideration one railroad corporation may guarantee the payment of the bonds of another.[6] It is

[1] Louisiana State Bank *v.* Orleans Navigation Co., (1848) 3 La. Ann. 294, in which case the powers of corporations at common law and under the Civil Code of Louisiana are fully discussed.

[2] Hall *v.* Auburn Turnpike Co., (1865) 27 Cal. 255.

[3] National Park Bank *v.* German-American Warehousing, etc., Co., (1889) 116 N. Y. 281; s. c., 26 N. Y. St. Repr. 675; Wahlig v. Standard Pump Manufacturing Co., (1889) 25 N. Y. St. Repr. 864; s. c., 5 N. Y. Supp. 420; citing Central Bank v. Empire Stone Dressing Co., 26 Barb. 23; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309. See, also, Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. 421; Farmers & Mechanics' Bank *v.* Empire Stone Dressing Co., 5 Bosw. 275; Morford *v.* Farmers' Bank of Saratoga, 26 Barb. 568.

[4] Wahlig *v.* Standard Pump Manufacturing Co., (1889) 25 N. Y. St. Repr. 864; s. c., 5 N. Y. Supp. 420.

[5] Mather *v.* Union Loan & Trust Co., (City Court of N. Y. 1889) 26 N. Y. St. Repr. 58; s. c., 7 N. Y. Supp. 213; citing McCullough *v.* Moss, 5 Denio, 567; Mechanics' Banking Association *v.* New York, etc., White Lead Co., 35 N. Y. 505; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125. See, also, Usher *v.* Raymond Skate Co., (Mass. 1895) 39 N. E. Rep. 416; Savage Mfg. Co. *v.* Worthington, 1 Gill. 284; Madison, etc., R. R. Co. *v.* Norwich Saving Society, 24 Ind. 457, modifying Smead *v.* R. R. Co., 11 Ind. 104; LaFayette Savings Bank *v.* St. Louis, etc., Co., 2 Mo. App. 299.

[6] Low *v.* California Pacific R. R. Co., (1877) 52 Cal. 53. It appeared in this case that one railroad company, under authority of law, leased the line of another for a term of years. The consideration of the lease was an annual rental, and that the lessee company should guarantee the principal and interest of bonds to be issued by the lessee company. The contract of

a good consideration for the guaranty of the bonds of one railroad corporation by another that the former conform its gauge to that of the latter and thus form running connections between the roads of the different corporations; and the guaranty of such bonds by a company empowered by general law of a state, "at any time, by means of their subscription to the capital stock of any other company, *or otherwise,* to aid such company in the construction of its railroad, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid," is within the powers of the guaranteeing corporation.[1]

§ 70. Guaranty of bonds of railroad corporations by one of another kind.— In a very recent and elaborately considered case, the United States Circuit Court for the district of Kentucky has held that a land company, a Kentucky corporation, vested by its charter with large and extensive franchises and powers, had power to guarantee the bonds of a railroad company.[2]

guaranty was challenged as *ultra vires.* The lessee company had no express authority to make such contract of guaranty, but did have power to make all such contracts as were usual and proper in the building and operation of a railway, and it likewise had power to lease the line of the lessor company. The Supreme Court held that the consideration was sufficient and the guaranty valid. They were of opinion that it was as competent for the company to promise to pay conditionally as to promise to pay absolutely; that the validity of the agreement depended upon the sufficiency of the consideration. The right to take the lease being express, it was a good consideration for the conditional promise involved by a contract of guaranty.

[1] Zabriskie *v.* Cleveland, Columbus & Cincinnati R. R. Co., (1859) 23 How. 381. In Connecticut Mutual Life Insurance Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co., (1863) 41 Barb. 9; s. c., 26 How. Pr. 225, the Supreme Court of New York held the arrangement entered into between several connecting railroad companies, for the purpose of securing a uniform gauge of the several roads, and thus increasing the business and profits of each, constituted a sufficient consideration for a guaranty by one of the corporations of the payment of the bonds of another; also that the general statute referred to in the text gave power to the companies whose lines were connected to enter into the arrangement as to a uniform gauge and to make it part of such arrangement that one or more of the companies should guarantee the payment of the interest coupons issued by another. See, also, Railroad Co. *v.* Howard, 7 Wall. 411.

[2] Tod *v.* Kentucky Union Land Co., (1893) 57 Fed. Rep. 47; affirmed by the United States Circuit Court of Appeals for the sixth circuit in Marbury *v.* Kentucky Union Land Co., (1894) 62 Fed. Rep. 335. LURTON, Circuit Judge, said: "The power to

§ 71. Circumstances surrounding corporation may authorize the guaranty.—The court applied the principles governing corporations in reference to their acts under the powers

execute accommodation paper, or to guarantee for accommodation the obligations of another corporation is not expressly conferred by the charter of the land company. Ordinarily, such power is not implied from the powers conferred upon corporations, and such contracts are generally in excess of the powers of corporations, and, therefore, void as *ultra vires*, in the true sense of the term. This proposition rested upon two or more very evident reasons: (1) The corporate funds belong to its shareholders, and, by the very terms of the law creating it, cannot be devoted to any other purposes than those indicated by its charter and constitution. Such obligations would violate the fundamental terms of the agreement between the corporators themselves. (2) To do so would be to exercise a power not conferred by the state, either expressly or impliedly. The state's grant of the corporate franchises is for the purpose prescribed, and the execution of such obligations would be beyond the power conferred, and, therefore, a diversion of the corporate purposes, as well as the corporate funds. (3) Such obligations rest upon no consideration, and would not, therefore, be valid. They would amount to a donation of the corporate funds, and, therefore, an unlawful diversion. Mor. Priv. Corp. 423; Davis *v.* Railroad Co., 131 Mass. 258; Madison Plank Road Co. *v.* Watertown Plank Road Co., 7 Wis. 59; McLellan *v.* File Works, 56 Mich. 579; s. c., 23 N. W. Rep. 321; National Park Bank *v.* German-American Mutual Warehousing & Security Co., 116 N. Y. 292; s. c., 22 N. E. Rep. 567; Ætna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167. But there is no inherent want of power in a business corporation, having the power to execute negotiable paper, to obligate itself as a surety or guarantor. If such a corporation receive commercial paper or bonds in due course of business, we see no reason why, upon transferring such paper, it may not be lawful to obligate itself as indorser or guarantor. Such a contract would be a new and independent contract, and would rest upon a sufficient consideration, if entered into as a legitimate means of increasing the value of the security to be disposed of in the ordinary course of business. In Railroad *v.* Howard the question arose as to the liability of a railroad company upon its guaranty of certain bonds issued by various counties and cities, and received by the railroad company in payment of subscriptions to its stock. Upon full consideration it was held that, inasmuch as the company had received the bonds in payment of stock, and had a right to obligate itself by its own bonds for the purpose of building its road, it might lawfully, and in furtherance of its authorized purpose, guarantee such bonds as a means of augmenting their value on the market, thus producing funds to build its road. 7 Wall. 411, 412. The power of a corporation to bind itself by a guaranty, when it does so for its own benefit and as a means of selling at an augmented value, is generally conceded by the authorities. 'In such cases,' says Mr. Randolph in his work upon Commercial Paper (Vol. 1, § 334), 'the guaranty is an original contract of the corporation for its own benefit, the consideration moving to itself, and not to the person whose debt is guaranteed.' There being no

expressly granted and implied, referring to the general purposes, franchises, etc., embraced in the charter of this land company, to this particular case, showing wherein the circumstances surrounding it made it legal and proper that it should guarantee the bonds of the railroad company.[1]

absolute want of power in an ordinary business corporation to bind itself as a guarantor, we must next inquire as to the circumstances which will make such a contract lawful and obligatory. The cases already cited establish the proposition that if such a corporation has the power to issue bonds or other commercial securities, and becomes the holder of such bonds or securities issued by other corporations, it may indorse or guarantee them upon transferring them for the purpose of raising money to carry out any purpose for which it might borrow money. The right of a corporation to do an act or make a contract is not always a question of law. What it may not do under some circumstances, it may do under others. It may carry on the business it is authorized to do in the usual and customary manner that business of the same nature is carried on by individuals."

[1] Tod *v.* Kentucky Union Land Co., (1893) 57 Fed. Rep. 47. Referring to a special power granted the land company for a "temporary consolidation" with the railroad company, it was said: "The power to make a temporary consolidation, looking to all the four corners of the charter, clearly implies the power to make such an alliance or bring about such a union and co-operation of interests between the land company and a railway company as shall be to the mutual interest of each, and place both under the same control and management. This could be done by the plan suggested by Mr. Morawetz in section 942 of his work on Private Corporations, whereby the shares of one company should be held by the other or by the same persons. This meaning seems reasonable and proper, looking to the objects and purposes of this corporation, and any steps which brought about unity of interest and co-operation in purpose as being legitimate and authorized. Under this power we are of opinion that [this] land company had the power to acquire the shares in the railway company, and the right to exercise control over the railway company through the ownership and control of those shares. Undoubtedly the general rule is that a corporation has no implied power to acquire shares in another for the purpose of controlling it. Marble Co. *v.* Harvey, 92 Tenn. 115; s. c., 20 S. W. Rep. 427. This would be contrary to the well-understood public policy concerning such companies. But this objection does not lie here: (1) Because the charter of the railway company expressly provides that its shares may be owned by any other corporation. (2) The express power in the charter of the land company removes all objections, based on grounds of public policy, to its control of a railway company by and through its shares. What the legislature of Kentucky has expressly permitted cannot be void as against public policy in the absence of any violation of a constitutional provision. Under such circumstances it is not for the courts to say that what the legislature authorizes is unlawful because contrary to public policy. Having authority to acquire this stock, the land company became the sole stockholder in the railway company. Each had express authority to borrow

§ 72. Guaranty of dividend upon preferred stock of another corporation.— The court also held that this land com-

money and issue bonds to carry out the purposes of the organization. The completion of this railway was an object within the scope of its charter powers. It could do so by its own name or by aiding the railway company to negotiate its securities by guaranteeing their payment. The guaranty was not for the accommodation of the railway company. The guarantor being the sole shareholder of the railway company, it was a contract for its own benefit, and, therefore, rested upon a sufficient security. In addition, the land company was a creditor of the railway company, and was to, and did, receive the proceeds arising from the sale of the half million of these bonds. The remainder of the money thus raised was to be applied to the building of the railway line. The consideration was sufficient to fully support the contract. A like question arose in Chicago, R. I. & P. R. Co. *v.* Union Pac. Ry. Co., 47 Fed. Rep. 16, where Mr. Justice Brewer held that 'where one railroad company owns substantially all the stock of another railroad company, a lease of the latter line for rent to be paid to the former company is not void for want of consideration since it amounts merely to an agreement to pay the rent directly to the stockholders.' Upon appeal to the United States Circuit Court of Appeals for the fifth circuit, this ruling was affirmed. 51 Fed. Rep. 329; s. c., 2 C. C. A. 242. The directors of the railway company held the property of that company, including these bonds and their proceeds, when sold, in trust for the * * * land company as holders of the shares in that company. To say that its guaranty of these bonds was a mere accommodation guaranty when it was the *cestui que trust* in the proceeds of the bonds, and thereby enable it to defeat its responsibility, as a contract *ultra vires*, would be sticking in the bark and result in manifest injustice. That at some future day this union may be dissolved by a sale of the stock owned by the land company is not of importance. The real and substantial owner of the railroad company at the time these bonds were guaranteed was the land company. The guaranty was for the benefit of the guarantors. Union Pac. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 51 Fed. Rep. 310; s. c., 2 C. C. A. 174. The case is not like that of Davis *v* Railroad Co, 131 Mass. 258. That was a donation to support a musical festival. The benefit to the railroad company was in the supposition that it would profit by increased travel. This was altogether too remote, and the contract properly held void. When the question is, as here, whether or not a particular act is *ultra vires*, decided cases are of little value. Each case must be largely a question of fact. Yet, by reference to a few of the decided cases, we can discover the principle upon which other courts have proceeded in deciding such questions. We will refer to a few cases: In Louisville & N. R. Co. *v.* Literary Society of St. Rose, 91 Ky. 395; s. c., 15 S. W. Rep. 1065, the Court of Appeals of Kentucky passed upon a question involving the implied power of a corporation. It appeared that the literary society of St. Rose and the literary society of St. Catherine were corporations for educational purposes, existing in or near the town of Springfield in Washington county, Kentucky. They had power to contract and to buy and sell real and personal property for the purpose of sustaining and carrying

pany was authorized to guarantee a dividend upon the preferred stock of the railroad company.[1]

on said institutions of learning and not otherwise. Each of them owned and operated a farm of about 1,000 acres of very considerable value. This, in the language of the court, 'created a large industry in the way of supplies furnished to them, and they in turn furnishing to others.' Each of these corporations signed an obligation to a railroad company to induce it to extend its line near their property. In an action upon those obligations, it was contended that they were *ultra vires*. The court said: 'Corporations derive their powers from charters. They are those which are expressly given or by fair implication are necessary to the execution of their object. Cases may be found where the officers of a corporation have exceeded their powers, but the corporation, nevertheless, held liable because the transaction was within the scope of its business, and it had received a benefit from it. The only trouble arose from a defect of power in the managers. This case is not within this class, however, because it appears beyond all doubt that the change of location as to depot was not to the interest of these institutions. The building of the road was calculated, however, to be highly beneficial to them, both as to furnishing convenient access to them for persons coming and going, and also in furnishing them a means of obtaining their supplies and sending their products to market. It was calculated to and undoubtedly did add greatly to the value of their properties and the large industries which their charters had authorized them to create. It conferred a direct benefit. The power existed by fair implication to do anything reasonably calculated to add to their value. How far this power extended we need not decide. Certainly, however, if during a portion of the year these institutions had been almost inaccessible for the lack of a turnpike or a bridge, a subscription by them to build either would have been valid; and while not authorized to enter into all manner of speculations, yet, in our opinion, a subscription by them to aid the building of this road was not, under all the circumstances, *ultra vires* and, therefore, void.' "

[1] Tod *v.* Kentucky Union Land Co., (1893) 57 Fed. Rep. 47, affirmed by United States Circuit Court of Appeals for the sixth circuit in Marbury *v.* Kentucky Union Land Co., (1894) 62 Fed. Rep. 335. This "guaranty," the court said, "stands upon the same footing as the guaranty of the bonds. The temporary consolidation between the two companies, springing out of the ownership of the stock in the railway company by the land company, in view of the terms of the charter of the latter company, authorized it to aid the former in any usual way to build its line of railroad." Certain second mortgage bonds of the railroad company were issued and delivered to the land company on account of indebtedness due by the railway company to the land company. A large part of these bonds had been sold by the land company, and were in the hands of various individuals who held them as *bona fide* purchasers for value. When sold, the payment of these bonds, principal and interest, was guaranteed by the land company. Others had been pledged as collateral security, and these, also, were guaranteed by the land company. As to these bonds the court said: "The bonds, having been received in payment of, or on account of, indebted-

§ 73. What contract of another corporation may not be guaranteed.— The United States Circuit Court of Appeals for the sixth circuit has held that a corporation organized under the law of Ohio for the purpose of making iron work for mining plants had not the power to guarantee the performance of another's contract for the erection of a mining plant, and the accompanying warranties, on the ground that the guaranty would secure a sale of the iron work used in the plant.[1] Further, the performance of such contract on the part of the party to whom the guaranty was given did not estop the corporation from denying its power to give the guaranty.[2]

§ 74. Athletic club.— A corporation formed under a statute for encouraging athletic exercises, under a provision of the statute that it "may hold real and personal estate, and may hire, purchase or erect suitable buildings for its accommodation to an amount not exceeding five hundred dollars," has power to take a lease of land, and to erect a suitable club house upon it. Having such power it may raise money for the purpose by negotiating a

ness, became the property of the [land company]. To augment their value when sold, or pledged as collateral, their payment was guaranteed. It is true that when this guaranty was placed upon the bonds, the clause in the charter of the land company permitting a consolidation with a railroad company had been repealed. Inasmuch, however, as the connection between these two companies was authorized when the latter acquired the stock of the former, and paid or assumed its debts, and inasmuch as this alliance, union or 'temporary consolidation' was in force when this repealing act took effect, and when these bonds were guaranteed, we think it was not prohibited by the repeal from continuing the union of the two companies, or obligating itself by this guaranty. The amendment should be construed as prospective and not retrospective. Any relation which had theretofore been entered into with this railway company was not affected by the amendment, and all which could be lawfully done by reason of such existing lawful union might thereafter be done, so long as it continued. Irrespective of the particular power resulting from the 'temporary consolidation,' and the relations resulting therefrom, this obligation of the land company is valid, under the authority of the cases holding that a corporation having the power to bind itself by commercial paper might indorse or guaranty commercial obligations received in ordinary course of business, and guaranteed when sold to augment the price realized in their sale and transfer." As to guaranteeing dividends, see Colman *v.* Eastern Ry. Co., 10 Beav. 1; Logan *v.* Earl of Courtown, 13 Beav. 22.

[1] Humboldt Min. Co. *v.* American Manufacturing, Mining & Milling Co., (1894) 62 Fed. Rep. 356.

[2] Ibid.

loan and giving its promissory note for its payment.[1] Additional authority given in the statute "to receive and hold in trust funds received by gift or bequest" will not confine it to that mode of raising it.[2]

§ 75. **Banking associations.**— The General Banking Law of New York did not give banking associations power, in express terms, to borrow money; but, notwithstanding this fact, the Supreme Court held that as such an association might become indebted, in the exercise of its undoubted legitimate business, it had, as a necessary incident, the power to borrow money for the purpose of paying its debts.[3] The Court of Appeals of New York, in a case between the receiver of this same banking association and other parties, held to the same effect that these banking associations had capacity to borrow money as incidental to the banking business and to the powers expressly granted.[4]

[1] Bradbury *v.* Boston Canoe Club, (1891) 153 Mass. 77; s. c., 26 N. E. Rep. 132.

[2] Ibid. Citing Fay *v.* Noble, 12 Cush. 1.

[3] Leavitt *v.* Blatchford, (1848) 5 Barb. 9. EDWARDS, J., for the court, said: "Without reference to the banking law, it is a general fundamental principle, that when a right is given, all powers are given which are necessary to the exercise and enjoyment of the right. Now, it cannot be questioned that a banking association may become indebted, in the exercise of its undoubted legitimate business. It has the right to receive deposits, and it must become indebted for them. It has the right to purchase gold and silver bullion, foreign coins and bills of exchange; and it may become indebted upon such purchase. It requires state stocks as a basis of its circulation, and it may lawfully contract a debt in the purchase of state stocks for that purpose. There may be other ways in which a banking association can become legally indebted. It may become liable for the payment of its debts at a time when, owing to disappointment, unexpected losses, or some unforeseen casualty, it has no available assets to meet its engagements. This emergency may occur in the soundest and best-regulated association. The question then must arise, whether a solvent institution is to fail to meet its liabilities, and be broken up and ruined, or whether it shall be permitted to substitute a credit for some convenient period of time, in the place of a debt then due and payable, or, in other words, whether it can substitute one creditor in the place of another. The power to borrow then is a necessary incident to the power to become indebted. It is a power without which no banking association could safely carry on its business."

[4] Curtis *v.* Leavitt, (1857) 15 N. Y. 9. COMSTOCK, J., in the opinion rendered by him, on page 63, stated the doctrine in Barry *v.* Merchants' Exchange Company, 1 Sandf. Ch. 280, 289, in the language of Assistant Vice-Chancellor SANDFORD: "A corporation, in order to attain its legitimate objects, may deal precisely as an individual may, who seeks to accomplish

§ 76. A savings bank's powers.— Every corporation created for transacting business, unless restrained by its charter or some statute, has, as a necessary incident, the power of incurring debts in the course of its legitimate business. For instance, in the case

the same ends. If chartered for the purpose of building a bridge, it may contract a debt for labor, the materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land or materials, or to pay for such labor, and as the evidence of the indebtedness, it may execute to the creditors a note, a bond, or a mortgage, whether the debt be for the money borrowed, or the work, materials, or land." COMSTOCK, J., said, on pages 64, 65: "I confess my own inability to refute the doctrine so perspicuously laid down by Assistant Vice-Chancellor SANDFORD. I am not aware that it comes in conflict with any known distinction between private persons and corporations. It is true that the latter take all their powers, direct and incidental, under their charters; but when the direct power is granted in terms, they take it, as a natural person enjoys it, with all its incidents and accessories. A simple association of merchants to build an exchange could, if they so agreed with each other, very appropriately borrow money in furtherance of the object, and why can they not, if they take the principal power under a charter from the government, which enables them to act as a single person, and with a collective will? It is truly said that corporations can only exercise such incidental powers as are necessary to carry into effect the express objects of their charters. But necessity is a word of flexible meaning. There may be an absolute necessity, a great necessity and a small necessity, and between these degrees there may be many others depending on the ever varying exigencies of human affairs. It is plain that corporations, in executing their express powers, are not confined to means of such indispensable necessity that, without them, there could be no execution at all. The entire doctrine would lead at once to a very great absurdity, for if there are several modes of accomplishing the end, neither one is indispensable, and each would exclude all the others. And thus, by inevitable logic, an express grant of power would lie forever dormant because there are more modes than one of carrying it into execution. It is almost as difficult to say that the incidental power depends for its existence on the degree of necessity which connects it with the power in chief. Such a doctrine would impose upon courts a never-ending difficulty, for the inquiry would plainly be whether the chosen instrumentality is the very best that could be selected, and if not the very best, however minute the difference may be, then the inevitable decision must follow that the choice was fatally bad, although strictly adapted to the end in view, and made in the utmost good faith. These demonstrations, for such they appear to me, would seem to leave but one other conclusion, which is, that corporations, along with their specific powers, take all the reasonable means of execution, all that are convenient and adapted to the end in view, although not the very best by many degrees of comparison. And this is a doctrine which must necessarily result in the liberty of choice amongst those means. The choice may be wise or unwise. If made in the exercise of an intelligent good

of a savings bank it was held that it had the power to negotiate a loan from another bank and of making and indorsing negotiable paper in payment of such debts.[1]

§ 77. Corporations dealing in lands.— The Supreme Court of California has held that "where a corporation was formed for the purpose of dealing in and speculating in real estate, and with the express power "to buy, improve, sell, lease and otherwise dispose of real estate" the term "improve" included the performance of any act, whether on or off the land, the direct and proximate tendency of which was to benefit or enhance its value. Therefore, a subscription made by such a corporation to a railroad company for the purpose of increasing the facilities and lessening the cost of transportation on the same, "where the direct and proximate tendency of such increase of facilities is to enhance the value of its lands" was held a valid and binding

faith, the wisdom of the selection may be called in question, but the power to make it cannot be. I can, therefore, see no room for the distinction which admits the power of a corporation to contract a debt for labor and materials to be used in building an exchange, or a bridge, or a turnpike road, or in manufacturing, those being in each case the specified object of the charter, but denies the right to borrow money to be used in the purchase of the same labor and materials. If there be any reason for a distinction, resting on a comparison of benefit to the corporation, the advantages of borrowing would in most cases be undeniable. So, in point of public policy, the reason for that preference would appear to be still stronger, for while the industrial classes would require no protection, the money lenders could safely be left to guard their own interests. I believe the distinction referred to is not recognized by any adjudged case." BROWN, J., discusses these questions in his opinion, pages 157–161; SHANKLAND, J., in his opinion, pages 166–169; PAIGE, J., in his opinion, pages 210–213.

[1] Fifth Ward Savings Bank *v.* First National Bank, (1886) 48 N. J. Law, 513. DEPUE, J., speaking for the Court of Errors and Appeals of New Jersey, said: "Savings banks are established for business purposes. Their functions are to receive, hold and invest moneys that may be deposited with them, and to repay the money deposited under reasonable regulations in their by-laws. In order to make the business successful, these institutions are required to keep their money invested as closely as may be consistent with the ordinary demands of depositors. But in seasons of financial excitements they may be subjected to extraordinary demands from depositors, to meet which and save the credit of the institutions, large sums of money may be required to be raised on sudden and unforeseen contingencies. At such times, the securities such institutions usually hold are likely to be depressed in the market and unsalable except at ruinous sacrifices. If these institutions should not have the power to borrow money and to make negotiable paper, or make a pledge of securities on which money

contract.[1] In a Pennsylvania case, where a corporation owned a large body of wild land and had power by its charter "to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country," the Supreme Court held that the building of saw mills and a hotel for the accommodation of those having business in connection with carrying out the prime object of the corporation was within its powers.[2] The Kansas Supreme Court, in an opinion delivered by Mr. Justice BREWER, now of the United States Supreme Court, held that where a corporation was created for the purpose of locating and laying out a town site, and making improvements thereon, it was within the power of such corporation to donate lands for the purpose of securing the erection and maintenance of a school upon property adjacent to that owned by the town site company; "that the direct and proximate tendency of the improvements sought to be obtained by the donation is the building up of the town, and the enhanced value of the remaining property. The purpose of the corporation is to build up the town, * * * and this purpose is directly furthered by such a donation."[3] In the United States Circuit Court for the western district of Virginia it was held that an improvement company organized under an act of the legislature of that state, to buy and sell lands, erect, sell and lease buildings, to grade and improve streets, to furnish gas, electric light and water works, to construct and operate street railways, furnaces and mills, and to acquire by purchase or subscription the stock or bonds of any mining, manufacturing, water, gas, street railway, or other improvement company, had power to give part of its stock to a railway company in order to enable the latter to complete its line to the property of the improvement company.[4] A corporation created for the purpose of dealing in lands, and to which the powers to pur-

may be borrowed temporarily, great sacrifices in the sale of the securities in which the trust funds are invested, if not financial ruin, would be the probable result of every unexpected run upon the bank by depositors to withdraw their deposits. It is the existence of conditions and contingencies of this kind likely to arise in the conduct of business that the law recognizes as the ground for raising by implication a power in corporations to borrow money and give negotiable security as a means of borrowing."

[1] Vandall *v.* Dock Co, 40 Cal. 84.

[2] Watts' Appeal, 78 Pa. St. 370.

[3] Whetstone *v.* University, 13 Kans. 320.

[4] McGeorge *v.* Big Stone Gap Imp. Co., (1893) 57 Fed. Rep. 262.

chase, to subdivide, to sell, and to make any contract essential to the transaction of its business are expressly granted, possesses as fairly incidental the power to incur liability in respect of securing better facilities for transit to and from the lots or lands which it is its business to acquire and dispose of.[1]

§ 78. Insurance corporations.— A corporation created for the purpose of carrying on the business of insurance, with power to convert its bonds and stocks into cash, when needed, to pay risks, may, through its president borrow money and pledge its stock as collateral security.[2] A corporation crganized under the law of Indiana providing for the organization of life and accident insurance companies, has power to borrow money and secure its payment by mortgaging its real estate.[3] The power to contract and be contracted with, is one of the common-law incidents of a corporation. Unless expressly restrained by its charter, every corporation has the incidental power to make any contract, and

[1] Fort Worth City Co. *v.* Smith Bridge Co., (1894) 151 U. S. 294; s. c., 14 Sup. Ct. Rep. 339, affirming a judgment in favor of the bridge company upon a contract to build a bridge over a river for which the corporation agreed to pay a portion in its bonds. FULLER, Ch. J., quoted in his opinion as follows: In Green Bay & Minnesota Railroad *v.* Union Steamboat Co., 107 U. S. 98, 100, it was said: "The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. * * *" Further on, he said: "The object of the creation of the corporation was the acquisition and sale of lands on subdivision, and it cannot successfully be denied that that object would be directly promoted by the use of legitimate business methods to render the lands accessible. This involved the expenditure of money or the assumption of liability, but there is no element in this case of any unreasonable excess in that regard, or of the pursuit of any abnormal and extraordinary method. The result sought was in accomplishment of the legitimate objects of the corporation and essential to the transaction of its authorized business, and the power to make the contract was fairly incidental if not expressly granted." See, also, North Side Ry. Co. *v.* Worthington, (Tex. Civ. App. 1894) 27 S. W. Rep. 746, following the case above.

[2] Bezou, Commissioner, *v.* Pike, (1871) 23 La Ann. 788. The court distinguished Levy *v.* Mutual Benefit Life & Fire Ins. Co., 8 La Ann. 380, in that the directors in that case did an act in conflict or inconsistent with an express provision of the charter.

[3] Wright *v.* Hughes, (1889), 119 Ind. 324; s. c., 21 N. E. Rep. 907.

evidence it by any instrument that may be necessary and proper to accomplish the objects for which it is created. A note or bill, therefore, made or received by such a corporation is *prima facie* within its corporate powers, and, therefore, valid.[1] But when such a transaction is drawn in question, it is always competent to show that it was given or taken for a purpose not authorized, and when shown, the contract is void, and the instrument a nullity.[2] A mutual life insurance company has been held in Connecticut to have the power, as incident to its business of insuring lives, to provide a guaranty fund by taking the notes of responsible parties, payable only if required for the purpose of meeting losses, and allowing a reasonable compensation to the makers of the notes for the use of their credit.[3] A corporation clothed by its charter with power to transact the business of life, fire, and marine insurance, receive money on deposit, collect

[1] Straus & Bro. *v.* Eagle Insurance Co. of Cincinnati, (1855) 5 Ohio St. 59; N. Y. Firemen Insurance Company *v.* Sturges, 2 Cow. 664; Barker *v.* Mechanic Fire Ins. Co., 8 Wend. 94.

[2] Straus *v.* Eagle Insurance Co. of Cincinnati, (1855) 5 Ohio St. 59; Broughton *v.* Manchester Water Works, 3 Barn. & Ald. 1; Munn *v.* Commission Co., 15 Johns. 44; New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678; N. Y. Firemen Ins. Co. *v.* Bennett, 5 Conn. 574; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Korn *v.* Mut. Soc., 6 Cranch, 199; Bank of Chillicothe *v.* Swayne, 8 Ohio, 257; McCullough *v.* Moss, 5 Denio, 567; Slark *v.* Highgate Archway Company, 5 Taunt. 792.

[3] Hope Mutual Life Ins. Co. *v.* Weed, (1859) 28 Conn. 51. The court said: "It was an arrangement which was made, not as an end, but only as a means or instrument for the successful prosecution of their main and appropriate business. And the facts before us conclusively show that such, in the present instance, was the only design or motive with which it was entered into, and that it was resorted to by the plaintiffs as a matter necessary to the prosecution of their proper business, and was shown by experience to be such. We cannot, therefore, pronounce that arrangement to be an illegitimate exercise of the powers conferred by their charter. Indeed, if we were to declare it invalid on this ground, we do not see why the broad ground must not be taken that, in the case of any corporation created for the purpose of carrying on a particular kind of business requiring credit in its prosecution, it would be an excess of its power to engage or secure, in support or aid of its own credit, that of other persons in regard to the fulfillment of its contracts, even when the exigencies of its business required such aid for its prosecution; and the principle would even go so far as to prohibit the ordinary engagement of suretyship in behalf of such corporation. Nothing is more common than the exercise of such a power by our pecuniary corporations, and the power is one from the exercise of which not only no evil, but the greatest benefits to such corporations and to the public, has arisen. And it was never before suggested that it was beyond the scope of the powers granted to such bodies."

promissory notes, and bills of exchange, lend money, and discount or sell such notes or bills, and to "borrow money and issue its bonds therefor," is not restricted by this latter provision to making loans secured by bonds, but has the incidental and implied power, common to all such corporations, to borrow money, and make negotiable, or non-negotiable paper, and give such securities as may be deemed most advantageous.[1] Under statutory authority to "invest their money in real or personal property, stocks or choses in action" an insurance corporation cannot subscribe for stock in a projected corporation.[2]

§ 79. **Manufacturing corporations.**— A corporation organized under the General Incorporation Act of Ohio, for the purpose of manufacturing and supplying gas to the inhabitants of a city or village, may borrow money to enable it to accomplish the legitimate objects of its creation, and secure the payment of the loan by note and a mortgage upon its property.[3] A corporation, incorporated "for the purpose of manufacturing and selling glass" may purchase glassware, for the purpose of keeping up their stock and supplying customers, while the works which they manufacture in are being put in repair.[4] A manufacturing corporation may incur a liability for a stock of merchandise to be sold by it in a retail store connected with their manufacturing

[1] Talladega Insurance Co. *v.* Peacock, Admr., (1880) 67 Ala. 253; Allen *v.* Montgomery R. R. Co., 11 Ala. 454; Mobile & Cedar Point Ry. Co. *v.* Talman, 15 Ala. 491; Lucas *v.* Pitney, 27 N. J. Law, 221; Railroad Company *v.* Howard, 7 Wall. 411. In Trenton Mutual Life & Fire Insurance Co. *v.* McKelway, (1858) 12 N. J. Eq. 133, 136, Chancellor WILLIAMSON said: "It cannot be denied but that the corporation might borrow money under some circumstances, and that a contract *bona fide* made for such loan would be illegal [legal?], and not in contravention of the charter. For instance, should the corporation incur a loss, and not have the available means promptly to meet it, it would not be illegal for them to make a loan to meet the exigency."

[2] Commercial Fire Insurance Co. *v.* Board of Revenue of Montgomery County, 99 Ala. 1; s. c., 14 So. Rep. 490.

[3] Hays *v.* Galion Gas Light & Coal Co., (1876) 29 Ohio St. 330.

[4] Lyndeborough Glass Co. *v.* Massachusetts Glass Co., (1873) 111 Mass. 315. The court said: "They succeeded a former company which had been engaged in the same business; it was important that they should retain the old customers. They were repairing their manufactory and machinery and these goods were bought to keep in their stock and enable them to fill orders from their customers until they could supply themselves from their own manufactory. Such purchases are auxiliary and incidental to the main purposes of their incorporation

business, as a convenience or necessity thereto.[1] A corporation manufacturing machinery may purchase cotton for use in packing its manufactures for cash or on credit and give its evidences of debt for the same.[2] A manufacturing and mercantile corporation may incur a liability in the nature of a reward to one causing the apprehension of persons charged with crime and their conviction.[3]

§ 80. **Mining corporations.**—The power to borrow money is an incident to the corporate powers of a mining corporation.[4] It is a necessary incident of a mining corporation that it shall have power to contract and to bind itself to those dealing with it in matters within the intent of the charter, even though the charter contains no express grant or power to contract or incur indebtedness.[5] A corporation, the purpose of which by the act creating it is to mine and transport coal, may purchase and use a steamboat for the purpose of transporting and delivering coal.[6] A corporation organized for mining purposes has power to purchase timber.[7] But it has no authority to issue accommodation paper and deliver it to strangers.[8] The board of directors of a

and are fairly within the scope of the powers conferred upon them by law. Brown *v.* Winnisimmet Co., 11 Allen, 326."

[1] Dauchy *v.* Brown, (1852) 24 Vt. 197.

[2] Gist *v.* Drakely, 2 Gill, (Md.) 330, 345.

[3] Norwood & Butterfield Co. *v.* Andrews, (1894) 71 Miss. 641; s. c., 16 So. Rep, 262. Citing Railroad Co. *v.* Cheatham, 85 Ala. 292; s. c., 4 So. Rep. 828; Ricord *v.* Railroad Co., 15 Nev. 167; Express Co. *v.* Patterson, 73 Ind. 430. In National Bank of Republic *v.* Edward C. Young, Receiver, etc., (1886) 41 N. J. Eq. 531, it was held that a corporation created for the purpose of carrying on a manufacturing business had implied power to make negotiable paper for use within the scope of its business, but no power to become a party to bills or notes for the accommodation of others. In Sumner *v.* Marcy, 3 Woodb. & M. 105, it was held that a manufacturing corporation could not legally invest money in a bank for the purpose of carrying on the banking business; nor could it issue promissory notes in payment of shares in a banking company which would bind the corporation or its members. As to the incidental power of a private corporation to make any contract necessary to advance the objects for which it was created, see Legrand *v.* Manhattan Mercantile Association, (1880) 80 N. Y. 638, affg. 44 N. Y. Super. Ct. 562.

[4] Kent *v.* Quicksilver Mining Co., (1879) 78 N. Y. 159.

[5] Wood Hydraulic Hose Mining Co. *v.* King, (1872) 45 Ga. 34.

[6] Callaway M. & M. Co. *v.* Clark, (1862) 32 Mo. 305.

[7] Adams Mining Co. *v.* Senter, (1872) 26 Mich. 73.

[8] Beecher *v.* Dacey, (1881) 45 Mich. 92.

mining corporation which is empowered to enter into any contracts essential to its ordinary business may borrow money for the purposes of the corporation and invest certain of its officers with power to negotiate loans, etc.[1] That such officers have been invested with power to negotiate loans, etc., may be shown otherwise than by official record of the board's proceedings.[2]

§ 81. **Railroad corporations.**—A corporation incorporated for the construction of a railway has power to agree to pay for its right of way in bonds.[3] A railroad company, granted a right to construct a particular line of road, with general power to purchase all kinds of property of whatever nature, may purchase from another railroad company a road constructed on that line if the latter company has the power to sell it.[4] Corporations created for the construction of railroads, in the absence of limitation or restraint by statute, have power to borrow money and to make bonds, bills or promissory notes for its repayment, and also power to mortgage their property, real or personal, as a security for such evidences of debt. These are powers necessary and proper to enable them to accomplish the purposes of their creation, and are regarded as incidental or implied, though not expressly conferred by the charter or act of incorporation.[5] A railroad corporation, with power to construct and maintain a railroad, cannot, however, incur a debt for an examination of mines along its route by an expert and a report upon the extent of the output of the same, this being a matter not within the legitimate purposes of its creation.[6]

§ 82. **The same subject continued.**—A railroad company has no right, under an authority to borrow money, to raise money

[1] Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192.

[2] Ibid.

[3] Munson *v.* Syracuse, Geneva, etc., R. R. Co., (1886) 103 N. Y. 58; s. c., 4 Cent. Rep. 191.

[4] Branch *v.* Jesup, 106 U. S. 468.

[5] Kelly *v.* Trustees of Ala. & Cinn. R. R. Co., (1877) 58 Ala. 489; Richards *v.* Railroad, 44 N. H. 127; Commonwealth *v.* Smith, 10 Allen, 448; Savannah & Memphis R. R. Co. *v.* Lancaster, (1878) 62 Ala. 555 As to the implied power of a corporation to borrow money needed for its legitimate purposes, and give security therefor to the lender, see In re Patent File Co., L. R. (6 Ch.) 83; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; Hays *v.* Galion Gas Light Co., 29 Ohio St. 330; Curtis *v.* Leavitt, 15 N. Y. 9.

[6] Georg *v.* Nevada Central Railroad Co., (Nev. 1894) 38 Pac. Rep. 441; citing Thomas *v.* Railroad Co., 101 U. S. 82; Davis *v.* Railroad Co., 131 Mass. 259.

by the issue of irredeemable bonds entitling the holder merely to a share of the earnings after the payment of a certain dividend to the stockholders; neither has it the right to issue interest-bearing bonds, secured by mortgage, if a portion of such bonds are perpetual.[1] Under the laws of Wisconsin railroad companies were given power to make such contracts with railroads terminating on the eastern shore of Lake Michigan, within the state of Michigan, as would enable them to run their roads in connection with each other, etc., and to "build, construct and run as a part of their corporate property such number of steamboats or vessels as they may deem necessary to facilitate their business. The Supreme Court of the United States has held that, under the power given by the above-mentioned statutes, a railroad company could contract with a steamboat company to run in connection with its line, and might lawfully guarantee that their earnings should not fall below a certain sum.[2] A cor-

[1] Taylor *v.* Philadelphia & Reading R. R. Co., (1881) 7 Fed. Rep. 386. McKennan, C. J., referring to the proposition to issue such bonds, said: "It does not propose to create the relation of debtor and creditor between the defendant and the subscribers. The money obtained by the defendant could not be regarded as borrowed, because that implies reimbursement, and it is not demandable by the subscribers or payable by the defendant. It has not the essential and distinguishing qualities of a loan. It contemplates a stipulation that the subscribers, in consideration of the sums paid, not lent, by them, shall be entitled to receive, in a remote and uncertain contingency, a portion of the defendant's earnings, to be measured by a certain rate per cent upon three times the sums paid by them, and after that shall participate with the common shareholders in the division of the residuary earnings. By what allowable definition of a loan or borrowing such a transaction can be embraced I am at a loss to conceive." Butler, D. J., concurring, said upon this question: "Every admissible definition of the term borrow or loan, as applied to money and commercial transactions, embraces an obligation to return the property borrowed. A loan of money is universally understood to be the delivery of a certain sum to another on contract for its return, generally with interest, as compensation for its detention and use. To call the payment of money to another, who is to receive and permanently retain it as his own, in consideration of an annual benefit or profit, a *loan*, would seem to be a plain misuse of language." See Kent *v.* Quicksilver Mining Co., 78 N. Y. 159, 177; Burt *v.* Rattle, 31 Ohio St. 116.

[2] Green Bay & W. R. Co. *v.* Union Steamboat Co., 107 U. S. 98; s. c, 2 Sup. Ct. Rep. 221, in which case Justice Gray said: "Whatever under the charter or other general laws, reasonably considered, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited." In Pearce *v.* Madison & Indianapolis R. R. Co., (1853) 21 How. 441, the Supreme

poration formed for the purpose of constructing a railroad cannot engage in the business of running a line of steamers.[1] Neither can it engage in the banking business in order to raise a fund with which to construct or operate its road.[2] Authority in the charter of a railroad corporation to "obtain by purchase or grant * * * any steamboats * * * that the said directors may deem necessary, profitable and convenient for this corporation to own, use and manage in connection with its said railroads" does not carry with it the power to buy off an opposition line of steamers with a view not of employing but of withdrawing them from the field of competition.[3] The power to issue to contractors in payment for work due negotiable certificates of indebtedness, payable in money or bonds, is included in the power granted a railroad corporation by its charter to build a road and issue bonds to pay therefor.[4]

§ 83. Raising money by borrowing notes and indorsement of them.—In a leading New Jersey case, the president and directors of a railroad company agreed among themselves that they would execute their individual several notes to the company and the latter should raise money upon them for the purposes of the corporation. The note involved in this action was never directly negotiated by the company to raise money, but was indorsed by the company as a renewal of former such notes and finally delivered to one to whom the company was indebted for money, in payment of that indebtedness. It was insisted before the Court of Errors and Appeals that the provision in the charter of the company "that the said corporation shall have power to borrow such sum or sums of money from

Court of the United States held that the purchase of a steamboat by the railroad corporation, to be run in connection with its business, was not authorized by its charter or within its power as necessary or incident to its business, and that there could be no recovery upon the notes given for its purchase. The court cited in support of their ruling: MacGregor *v.* The Official Manager of the Deal & Dover Railway, 16 Eng. Law & Eq. 180; Colman *v.* Eastern Counties Railway Co., 10 Beav. 1; East Anglian Railways Co. *v.* Eastern Counties Railway Co., 11 C. B. 803; Head *v.* Providence Insurance Co., 2 Cranch, 127; Bank of Augusta, *v.* Earle, 13 Pet. 519; Perrine *v.* Chesapeake & Delaware Canal Co., 9 How. 172.

[1] McCarty *v.* Roots, 21 How. 432.

[2] Waldo *v.* Chicago R. R. Co., 14 Wis. 575, 580.

[3] Morgan & Raynor, Trustees, *v.* Donovan, (1877) 58 Ala. 241.

[4] Pusey *v.* New Jersey West Line R. R. Co., (1873) 14 Abb. Pr. (N. S.) 434.

time to time, as shall be necessary to build, construct or repair said road, and furnish the said corporation with all the necessary engines and machinery for the uses and objects of the said company, and to secure the payment thereof by bond or mortgage, or otherwise," was a limitation of the power of the company to borrow money for specified purposes, and in the mode designated, and was tantamount to a prohibition of the company's borrowing money for any other purpose or upon any other security than that specified. The court held that it was within the power of the company to raise money through borrowing these notes and indorsing them to others for its indebtedness.[1]

[1] Lucas *v.* Pitney, (1858) 27 N. J. Law, 221. Chief Justice GREEN in the opinion rendered said that this section of the charter "was designed not as a limitation or restriction of the powers of the corporation, but as a grant of additional power. * * * The corporations are clothed with powers, which, independent of that provision, they could not have exercised. But there is nothing in the provision which, by necessary implication or by fair intendment, can be construed to limit the general powers and capacities incident to every corporation." On the part of the defendant, it was insisted that a corporation can make no contract which is not necessary to enable it to answer the object of its incorporation; that the loaning of money, or the borrowing of notes to be discounted in market, is not necessary to the operation of a railroad company; and that, consequently, the making or indorsement of commercial paper by such company as a security for money loaned and the indorsement of notes borrowed for the purpose of raising money were void acts. To this insistment the chief justice said: "The simple inquiry is whether a railroad company has, as a necessary incident, the inherent power of borrowing money for the payment of its debts or for its necessary purposes. It is conceded that the corporation has such powers only as are expressly conferred by charter or necessarily incident to those powers. If it may lawfully contract debts, it would seem clear that it may enter into obligations to pay those debts or borrow money for that purpose. The power of incurring debts in the course of its legitimate business, of giving notes, or borrowing money for the payment of such debts would seem necessarily incident to every corporation whose business involved the expenditure of large sums of money, and often upon sudden and unforeseen contingencies. Such it is believed is the universal custom of all important corporations whether private or municipal. The authorities in support of the practice are abundant. Our statute recognizes bodies politic or corporate as persons by whom promissory notes and bills of exchange may be drawn, indorsed and accepted. Nix. Dig. 667, § 4 (N. J.). The technical doctrine that a corporation can contract only under its corporate seal, was long since exploded. In Munn *v.* The Commission Co., 15 Johns. R. 44, it was held that a corporation of limited powers might engage to pay or advance money at a future day by the acceptance of a bill of exchange. In Mott *v.* Hicks, 1

§ 84. Evidences of indebtedness — form.— At common law a corporation has power to issue a bond or note to pay a debt.[1] The weight of modern authority supports the conclusion that private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they shall do so, subject only to such express limitations as are imposed by their charter. The power to borrow carries with it, by implication, unless restrained by the charter, the power to secure the loan by mortgage. Accordingly, it may be regarded as settled, that where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories; it may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden.[2] Unless restrained by legislative enactment

Cowen, 513, it was held that a private corporation might give a negotiable promissory note for a debt incurred in its ordinary business. In Kelley *v.* Mayor of Brooklyn, 4 Hill, 263, it was held that a municipal corporation may issue negotiable paper for a debt contracted in the course of its proper business; and in delivering the opinion of the court COWEN, J., said: "Independently of any statute provision, a corporation may issue negotiable paper for a debt contracted in the course of its proper business. This is a power incident to all corporations, and no provision in its charter, or elsewhere, merely directing a certain form in affirmative words should be so construed as to take away the power. The same general principle will be found in Moss *v.* Oakley, 2 Hill, 265; Barker *v.* The Mechanic Ins. Co., 3 Wend. 96; Furniss *v.* Gilchrist, 1 Sandf. Sup. Ct. R. 53; Angell & Ames on Corp. § 257; Pierce on Railroads, 372. The result of the authorities, to adopt the language of a recent writer, seems to be that corporations carrying on business under no restraining act may make promissory notes and draw bills of exchange, where these are the usual and proper means to accomplish the purposes of their organization; that such notes and bills are to be presumed legal and valid where they are not prohibited by law and are received in good faith, and that they are invalid when given in violation of law, or when given for purposes wholly foreign to those for which the incorporation was created."

[1] McLane, Trustee, *v.* Placerville & Sacramento Valley R. R. Co., (1885) 66 Cal. 606; citing Commonwealth *v.* Smith, 10 Allen, 448; Comrs. of Craven *v.* Atlantic & N. C. R. R. Co., 77 N. C. 289; Miller *v.* New York & Erie R. R. Co., 18 How. Pr. 374; Dana *v.* Bank of United States, 5 Watts & S. 223.

[2] MITCHELL, J., in Wright *v.* Hughes, (1889) 119 Ind. 324; s. c., 21 N. E. Rep. 907; New England, etc., Ins. Co. *v.* Robinson, 25 Ind. 536; Jones *v.* Guaranty, etc., Co., 101 U. S. 622; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Booth *v.*

to a specific mode of contracting, the contracts a corporation has capacity to make may be made in that manner or form in which a similar contract by an individual could be made.[1] A private corporation, authorized to "borrow money and issue their bonds therefor," may bind itself by simple as well as by sealed contracts.[2]

§ 85. **More rules on this subject.**—There is a capacity in a corporation to enter into any obligation or make any contract essential for its purposes and for the transaction of its ordinary affairs. Such a power to contract existing, the power may be exercised by the corporation or its proper officers as a natural person can contract unless its charter presents some particular mode of contracting.[3] Promissory notes may be given by trad-

Robinson, 55 Md. 419; Hays *v.* Galion Gas Light Co., 29 Ohio St. 330; Memphis, etc., R. R. Co. *v.* Dow, 19 Fed. Rep. 388; Green's Brice's Ultra Vires, 223; 1 Moraw. on Corp. §§ 342, 343.

[1] Trustees of University *v.* Moody, (1878) 62 Ala. 389. BRICKELL, Ch. J. said: "The technical rule of the ancient common law, that a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal, if it ever obtained in this country, is now obsolete."

[2] McCullough *v.* Talladega Insurance Co., (1871) 46 Ala. 376; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Talladega Ins. Co. *v.* Landers, 43 Ala. 115. That corporations may contract, as individuals do, in matters pertaining to their business, see Smead *v.* Indianapolis, etc., R. R. Co., 11 Ind. 104; Talman *v.* Rochester City Bank, 18 Barb. 123. As to the power of a corporation expressly or impliedly authorized to borrow money being exercised by issuance of negotiable bonds, see Des Moines Gas Co. *v.* West, (1878) 50 Iowa, 16. For rules in English cases as to liability of corporations upon contracts not under seal, see Arnold *v.* Mayor of Poole, 2 Dowl. (N. S.) 574; Bowen *v.* Morris, 2 Taunt. 374; Paine *v.* Guardians of Strand Union, 8 Q. B. 326; Cox *v.* Midland Counties Railway Co., 3 Exch. 268; Lamprell *v.* Billericay, 3 Exch. 306. How far they confine liability on promissory notes and bills of exchange to trading corporations only, see Mayor of Ludlow *v.* Charlton, 6 Mees. & W. 815; Murray *v.* East India Co., 5 B. & Ald. 204; Broughton *v.* Manchester W. Wks., 3 Barnw. & Ald. 1; Beverley *v.* Lincoln Gas Co., 6 Ad. & E. 829: Rew *v.* Pettet, 1 A. & El. 196; Church *v.* Imp. Gas Light Co., 6 Ad. & E. 846.

[3] McKiernan *v.* Lenzen, (1880) 56 Cal. 61. As to what officers of a corporation may do in connection with the affairs of a corporation, see Gillett *v.* Campbell, 1 Denio, 520, 522; Carey *v.* Giles, 10 Ga. 10; Phillips *v.* Campbell, 43 N. Y. 271. As to what a general manager cannot do, see Stow *v.* Wyse, 7 Conn. 219; Hawtayne *v.* Bourne, 7 Mees. & W. 595; Life & Fire Ins. Co. *v.* Mechanic Fire Ins. Co., 7 Wend. 31; Knight *v.* Lang, 4 E D. Smith, 381; Benedict *v.* Lansing, 5 Denio, 283; Torrey *v.* Dustin Monument Association, 5 Allen, 327, 329;

ing corporations for any indebtedness contracted within the scope of their powers, and it may *prima facie* be presumed that any notes given by them are for an indebtedness within the scope of their powers.[1] The power of a corporation to create debts and to make promissory notes is an incident to the power conferred by statute of California "to make by-laws, * * * for the organization of the company, the management of its property, the regulation of its affairs, the transfer of its stock and for carrying on all kinds of business within the objects and purposes of the company."[2] The provision of the statute of California that "no corporation created or to be created shall by any implication or construction be deemed to possess the power of issuing bills, notes or other evidences of debt upon loans or for circulation as money" has been construed not to prohibit the borrowing of money by corporations and issuing the usual evidences of debt therefor.[3] The constitutional provision of California forbidding, except on certain conditions, the increase by corporations of their bonded indebtedness has been held not to forbid the execution of non-negotiable notes and mortgages by a corporation in consideration of the promise by the payee of the notes and mortgages to advance money and deliver lumber as needed by the corporation for improvement of the mortgaged property.[4] A building association, the charter of which vests it with such power as to enable it to borrow money and to make loans to its members with a view to accomplish the purpose of its formation, may employ the usual legal methods of effecting this purpose, subject to such restrictions as that it shall not issue paper currency, for instance. And, having the right to effect a loan, it, through its officers, in their discretion, may give a promissory note for the purpose, and it may issue such a note for an intended indebtedness.[5] It is competent for any manufacturing corporation organized under the general laws of Minnesota to execute promissory notes as evidence of the debts it may lawfully contract.[6] As

Despatch Line of Packets *v.* Bellamy Manufacturing Co., 12 N. H. 205, 228; Luse *v.* Isthmus Transit Ry. Co., 6 Oreg. 125.

[1] Gebhard *v.* Eastman, 7 Minn. 56.

[2] Smith *v.* Eureka Flour Mills Co., (1856) 6 Cal. 1.

[3] Magee *v.* Mokelumne Hill Canal & Mining Co., (1855) 5 Cal. 258.

[4] Underhill *v.* Santa Barbara Land, Building & Imp. Co., 93 Cal. 300; s. c., 28 Pac. Rep. 1049.

[5] Davis *v.* West Saratoga Building Union, (1869) 32 Md. 285.

[6] Sullivan *v.* Murphy, 23 Minn. 6. In Bacon *v.* Mississippi Insurance Co., 2 George (Miss.), 116, the Supreme Court of Mississippi held that a corpora-

under our general credit system, and the manner and modes of doing business, the success and prosperity of manufacturing corporations and other enterprises of like character would be greatly impeded and embarrassed, if not utterly destroyed, without the capacity and power to contract debts, borrow money and make and receive bills of exchange and promissory notes, these powers will be inferred where there are no prohibitions to the contrary in their charters.[1] A manufacturing corporation, declared by general law for the incorporation of such an one, "capable of buying, purchasing, holding and conveying any lands or tenements, hereditaments, goods, wares and merchandise whatever, necessary to enable [it] to carry on their manufacturing operations * * * ," has power to execute its promissory notes upon the purchase of such personal property or in liquidating the claims of its employees in its legitimate transactions. It also possesses power to borrow money for the same purposes and to bind itself in its corporate capacity by a written obligation for its payment.[2] A corporation authorized to construct a building for its use and purposes may accept an order drawn upon it by a materialman for material furnished and payable out of money due such materialman.[3] There can be no recovery on a note given by a corporation on a contract beyond the scope of its power.[4] A corporation being authorized by its charter to incur indebtedness and give evidence thereof, one dealing in its securities may, in the absence of notice to the contrary, assume that restrictions upon its power have not been violated.[5] A corpora-

tion having power to loan money on bottomry, *respondentia*, etc., had no power to borrow money, and *prima facie* no power to make a promissory note. As to making promissory notes by private corporations in the course of their legitimate business, see Brode *v.* Firemen's Insurance Co., 8 Rob. (La.) 244; Louisiana State Bank *v.* Orleans Navigation Co., 3 La. Ann. 294.

[1] Oxford Iron Co. *v.* Spradley, (1871) 46 Ala. 98; New York Firemen Ins. Co. *v.* Sturges, 2 Cowen, 664.

[2] Mead *v.* Keeler, (1857) 24 Barb. 20. It was further said by the court· "It is to be presumed that [corporations] will conduct their operations in detail substantially upon the same principles and in the same manner as individuals engaged in like business. And when they do so, and confine themselves to the purposes and objects of their incorporation, they should not be deemed as transcending their authority, but should be regarded as acting within the scope of those implied incidental powers necessary to the full and advantageous development of those which are expressly given."

[3] Board of Trustees of Prairie Lodge *v.* Smith, (1880) 58 Miss. 301.

[4] Pearce *v.* Madison R. R., 21 How. 441.

[5] National Park Bank *v.* German-American Warehousing, etc., Co.,

tion may make a promissory note for a debt contracted in the course of its legitimate business, although not specifically authorized by its charter to contract in that form.[1]

§ 86. **Bonds of a banking association.**—In a case before the Court of Appeals of New York, the court held certain evidences of debt, called bonds, payable at different periods, issued by this banking association, intended for sale in London, to raise money for the uses of the association, bearing interest payable semi-annually in London, not naming the place for the payment of the principal, with the corporate seal impressed upon each bond, but without the use of wax or other tenacious substance, not to be within the prohibition of the restraining laws, and to be valid securities for the money loaned thereon, even if regarded as unsealed obligations, and, therefore, in legal effect, mere promissory notes.[2]

(1886) 53 N. Y. Super. Ct. 367; following Ellsworth *v.* St. Louis, Alton & Terre Haute R. R. Co., 98 N. Y. 553.

[1] Moss *v.* Oakley, (1842) 2 Hill, 265; citing Mott *v.* Hicks, 1 Cow. 513; Barker *v.* Mechanic Fire Ins. Co., 3 Wend. 94. Later, in a case in the Chancery Court of New York, Attorney-General *v.* Life & Fire Insurance Co., (1842) 9 Paige, 470, the chancellor, WALWORTH, held that a corporation which was not prohibited by law from doing so, and without any express power in its charter for that purpose, might make a negotiable promissory note, payable either at a future day or upon demand, where such note was in fact made or given for any of the legitimate purposes for which the company was incorporated. He further held that where such notes have been issued and put in circulation in violation of a restraining law, it seems the holder is bound to show that he received them in the ordinary course of business and paid a valuable consideration for them, without notice of the illegal object for which they were issued, to entitle him to recover thereon as a *bona fide* holder.

[2] Curtis *v.* Leavitt, (1857) 15 N. Y. 9. Speaking as to the power of corporations to issue such paper, COMSTOCK, J., in his opinion, on page 66, said: "The right of corporations in general to give a note, bond or other engagement to pay a debt is so nearly identical, or so inseparably connected with the right to contract the debt that no doubt upon the question ought to be admitted. When a corporation can lawfully purchase property or procure money on loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have the power to give, any known assurance, which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence. This doctrine would seem to be clear in principle, and it is well settled in this state. Mott *v.* Hicks, 1 Cow. 513; Barker *v.* Mechanic Ins. Co., 3 Wend. 96; Jackson *v.* Brown, 5 Wend. 590; Moss *v.* Oakley, 2 Hill, 265; At-

§ 87. Power to secure their indebtedness.— It is now well settled that corporations, like individuals, may borrow money for the conduct of their affairs, without express authority therefor, whenever the nature of their business may render it proper or expedient. And the power to borrow carries with it very generally, unless expressly restrained, the power to secure the loan by mortgage.[1] Having negotiated a loan for the advancement of its best interests, a corporation may pledge, as security for the loan, unissued stock held by it in trust.[2] The power to sell such securities for the payment of its debts, includes the power of the corporation to pledge securities owned by it for the same purpose.[3] The securities of a corporation may be lawfully pledged by the directors of a solvent corporation to secure individual demands of directors and others, due or to accrue, for money loaned to the corporation.[4]

§ 88. Limitation of indebtedness.— A limitation by statute of the amount of debts of a corporation includes indebtedness to the directors as well as indebtedness to third parties.[5] In a case

torney-General *v.* Life & Fire Ins. Co., 9 Paige, 470; Safford *v.* Wyckoff, 4 Hill, 442; Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280. It would be a very illogical conclusion to hold that an indefinite number of corporations, authorized by a general law, do not possess the same right in this respect, which they would have if the express powers of each were derived from a special charter."

[1] Booth *v.* Robinson, (1880) 55 Md. 419; Susquehanna Bridge Co. *v.* Insurance Co., 3 Md. 305; Australian Steamship Co. *v.* Mounsey, 4 K. & J. 733; Curtis *v.* Leavitt, 15 N. Y. 9; Beers *v.* Phœnix Glass Co., 14 Barb. 358; Mead *v.* Keeler, 24 Barb. 20; Partridge *v* Badger, 25 Barb. 146; Clark *v.* Titcomb, 42 Barb. 122; Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280; Life Insurance Co. *v.* Mechanic Ins. Co., 7 Wend. 31; Barnes *v.* Ontario Bank, 19 N. Y. 152; Smith *v.* Law, 21 N. Y. 296; Nelson *v.* Eaton, 26 N. Y. 410; Holbrook *v.* Basset, 5 Bosw. 147; Lucas *v.* Pitney, 27 N. J. Law, 221; Hackettstown *v.* Swackhamer, 37 N. J. Law, 191; Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256; Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Ala. Gold Life Ins. Co. *v.* Central, etc., Assn., 54 Ala. 73; Union Bank *v.* Jacobs, 6 Humph. 515; Moss *v.* Harpeth Academy, 7 Heisk. 283; Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. 14; Bank of Chillicothe *v.* Chillicothe, 7 Ohio, pt. 2, 31; Hamilton *v.* Newcastle R. R. Co., 9 Ind. 359; Rockwell *v.* Elkhorn Bank, 13 Wis. 653; Thompson *v.* Lambert, 44 Iowa, 239; Bradley *v.* Ballard, 55 Ill. 413; Gause *v.* City of Clarksville, 7 Rep. 519; Union Mining Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Magee *v.* Mokelumne Hill Canal Co., 5 Cal. 258.

[2] Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24.

[3] Leo *v.* Union Pac. Ry. Co., 17 Fed. Rep. 273.

[4] Stout *v.* Yaeger Milling Co., 13 Fed. Rep. 802.

[5] Tallmadge *v.* Fishkill Iron Co., 4 Barb. 382.

before the Court of Common Pleas of New York city, it has been held that where a corporation adopted a by-law providing that all contracts by it involving a liability for $500 or more must be in writing, executed by both the president and treasurer, and attested by the seal of the company, the company cannot be held liable on a lease to it reserving a rent exceeding $500, and executed by the president alone, without the seal of the company; and this whether the lessor had notice of the by-law or not.[1] And in such case, no ratification could be based on the treasurer's knowledge of the facts where his testimony that he refused to sign the lease was wholly uncontradicted.[2] The Kansas Supreme Court has held that a private corporation organized under the statute of that state was bound by a contract within the scope of its business, by which an indebtedness greater than $500 was incurred, notwithstanding a provision in its charter that its indebtedness should not exceed $500, as this provision was merely directory, and the statute under which it was organized did not require its indebtedness to have any limit other than the amount of its capital stock.[3]

§ 89. **Debt limited by par value of capital stock.**— A street railway company, a Pennsylvania corporation, was authorized by its charter to borrow money not exceeding in amount "one-half of the par value of the capital stock." The capital authorized in the act of the legislature granting its charter was $1,000,000. Only ten per cent, or $100,000, of the authorized amount was paid in. The directory of the company by resolution authorized an issue of bonds, to be secured by mortgage to the amount of

[1] Bohm *v.* V. Loewer's Gambrinus Brewery Co., (1890) 16 Daly, 80; s. c., 9 N. Y. Supp. 514, following Rathburn *v.* Snow, 3 N. Y. Supp. 925. See, also, Westerfield *v.* Radde, 7 Daly, 326.

[2] Bohm *v.* V. Loewer's Gambrinus Brewery Co., (1890) 16 Daly, 80; s. c., 9 N. Y. Supp. 514. Bischoff, J., said: "An attempt was made by the plaintiff, upon the trial, to show a subsequent adoption or ratification of the president's act by the trustees, predicated upon the neglect of the trustees to repudiate the transaction when it was brought to their notice. * * * The trustees * * * as such, could not, pursuant to the provisions of the by-laws mentioned, have originally created any liability on behalf of the corporation exceeding five hundred dollars in amount; and it cannot be said that they can by implication do the acts prohibited in unequivocal terms. Peterson *v.* Mayor, etc., 17 N. Y. 449; Brady *v.* Mayor, etc., 20 N. Y. 312–319."

[3] Sherman Center Town Company *v.* Morris, 43 Kans. 282; s. c., 23 Pac. Rep. 569.

$250,000. A bill in equity having been filed by the commonwealth to restrain by injunction the issue of these bonds to the extent proposed, an injunction was decreed, from which an appeal was entered to the Supreme Court of the state. Before the latter the contention of the company was that the grant of power in their charter authorized an issue of bonds for the purpose of borrowing money to the amount of one-half of their authorized capital. The Supreme Court held adversely to this contention, and sustained the decree of the court which enjoined an issue of the bonds beyond the amount of $50,000, one-half of the amount of the stock actually paid in.[1]

[1] Commonwealth *v.* Lehigh Ave. Ry. Co., (1889) 129 Pa. St. 405; s. c., 18 Atl. Rep. 414, 498; 7 Ry. & Corp. L. J. 42. WILLIAMS, J., for the court, upon the question of what constitutes the capital stock of a corporation and its par value, discusses the question, quite *in extenso* as follows: "The words stock and capital stock may be defined as meaning the fund or property belonging to a firm or corporation, and used to carry on its business. This is contributed by those who embark in the business. The articles of copartnership, or the charter of the corporation, fix the maximum amount of stock that may be issued, and this may properly be spoken of as the proposed or authorized capital of the company. When an organization is effected, subscriptions are made to the stock, by which the subscribers agree to take and pay for certain sums or shares each. The total amount of the stock thus taken constitutes the subscribed capital of the company. Some of these subscriptions may not be paid and may be uncollectible, but when the amount subscribed, or called for upon subscriptions, has been collected, so far as collection is practicable, the amount so gathered into the treasury constitutes the actual capital on which the business is undertaken. The amount paid by each subscriber measures his relative interest in the whole. As between himself and the corporation, or his fellow-subscribers, or the public, his share of the whole stock is fixed by the proportion which his actual contribution bears to the entire amount contributed by all who are associated in the enterprise. * * * Does the corporation stand on better ground than its members? It claims the right to issue bonds because of its stock. We must inquire, therefore, first, what is the amount of its stock? And, next, what is the par value of a share of that stock? We think the first of these questions is, in the light of the facts in this case, answered by repeated decisions of this court. Whether it be for the purpose of adjusting and paying dividends to stockholders, or of regulating the amount of taxes due to municipalities having the right and power to tax the amounts of stock actually paid is the capital stock of the company. Citizens' Pass. Ry. Co. *v.* Philadelphia, 49 Pa. St. 251. Neither the cost of the road, nor the authorized capital can be made the basis of dividends or taxation, but these must rest on the amount of capital stock actually paid in. Second & Third St. Pass. Ry. Co. *v.* Philadelphia, 51 Pa. St. 465; Philadelphia *v.* Philadelphia & Gray's Ferry Pass. Ry. Co., 52 Pa. St. 177; Philadelphia *v.* Ridge Avenue Ry. Co.,

§ 90. When a statutory limitation of indebtedness does not apply.— In a Minnesota case where the corporation, a milling company organized under the general statute of that state,

102 Pa. St. 190. The company appellant proposes to exercise a power and incur a liability upon the basis of its capital stock, and for this purpose, as for purposes of taxation or payment of dividends, its rights must be measured not by nominal or authorized capital, but by the actual amount of capital paid in. The issuing of certificates of stock to the subscribers does not add to the common stock in the treasury or business of the corporation, nor does it increase the interest of the individual stockholder. He takes this certificate when issued, subject to all the unpaid installments of the subscription and the terms and conditions on which the subscription was made. Its value to him, as between him and the corporation, is what he has paid upon it; no more, no less. That value may be increased or diminished in a commercial sense by the success of the business, the ability of the management, or other similar consideration, and such increase or decrease makes the market value greater or less than the amount he has paid upon it, as the case may be; but as between himself and the corporation or his fellow-stockholders the consideration of market value has no place. He must pay his subscription as calls are made whether the venture prospers or fails. If the value of the stock is measured by what has been paid upon it, is the 'par value' measured in the same manner when the right of the corporation to do a given act is to be settled? The par value of the stock of this corporation for purposes of taxation or payment of dividends, is, as we have already seen, the amount actually paid upon it, or one hundred thousand dollars, This is well settled by the cases we have cited, which hold that, for the purposes enumerated, the par value has no necessary relation to either the authorized or the market values, but is fixed by the amount actually paid, and is the equivalent or par of the value of the shares as shown by the stock account. The issuing of certificates does not affect our question. If issued they cannot increase the money in the treasury, or confer any independent right on the stockholder. They simply afford evidence of the extent of his interest in a more convenient form than the books of the company furnish, but leave him subject to all the liabilities resting on him before they come into his hands. We see no good reason for distinguishing this case from the cases cited above, but regard it as substantially ruled by them. The [corporation here] has received just one hundred thousand dollars from the subscribers to its stock. So far as the paper books advise us, this is all it has ever asked for in the more than fifteen years of its corporate life, and all it expects to receive. The other nine hundred thousand dollars of authorized capital are uncalled and unpaid. The par value of all its shares taken together is one hundred thousand dollars, because that is the sum paid upon them, the value they represent. The par value of each share is fixed in like manner. Its value is the equal, or par, of the corporate capital it represents, which is the amount paid upon by the subscriber or applied to it out of the earnings of the corporation. * * * We have the fact on the record that but one-tenth of the nominal value [of the stock] has been paid. The corporation is the party. It has one hun-

one of the original articles of incorporation of which provided that "the highest amount of indebtedness or liability to which said corporation shall be subject shall not exceed $5,000," was sued upon a promissory note issued by it in payment of a balance upon settlement of an account, to one who was an officer of the company and a member of a banking firm through which the financial business of the corporation was largely done, and by him transferred before maturity to the bringer of this action, the corporation made the defense that the giving of the promissory note was *ultra vires*. The Supreme Court affirmed the order of the trial court giving judgment in favor of the plaintiff.[1]

dred thousand dollars in its treasury and no more; yet it asks us to hold that the par value of its stock is one million dollars, and permit it to exercise an important power on that basis. This we decline to do. The par value of its shares is measured by the money it has received upon them, and not by the broken promises of those who subscribed for them."

[1] Auerbach *v.* Le Sueur Mill Co., (1881) 28 Minn. 291; s. c., 9 N. W. Rep. 799. Reasoning in support of their judgment, the court said: "Where a private corporation has authority to issue negotiable securities, such instruments, when issued, possess the legal character ordinarily attaching to negotiable paper, and the holder in good faith before maturity, and for value, may recover, even though, in the particular case, the power of the corporation was irregularly exercised or was exceeded; or, to state the legal proposition in its application to this case, this defendant having power to incur debts to a limited extent and to issue its negotiable notes therefor, the plaintiff, as a *bona fide* holder of the note in suit, may recover upon it, although, in this particular case, the indebtedness of the corporation at the time of giving this note already exceeded the limits prescribed by its articles of association. Stoney *v.* American Life Ins. Co., 11 Paige, 635; Mechanics' Banking Assn. *v.* New York & Saugerties White Lead Co., 35 N. Y. 505; McIntire *v.* Preston, 10 Ill. 48; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; Bissell *v.* Mich. Southern & Northern Ind. R. Co., 22 N. Y. 258, 289; City of Lexington *v.* Butler, 14 Wall 282; Moran *v.* Miami County, 2 Black, 722; Angell & Ames on Corp. § 268; Field on Corp. 303; Green's Brice's Ultra Vires, 273, 274, 729. Although in such a case the corporation or its officers exceeded the corporate authority, and its contract would be, hence, in a sense, *ultra vires*, yet other legal principles, besides those merely relating to the powers of the corporation, come in to affect the result. It is true, a corporation is a being created by the law, and has properly no authority but such as is conferred upon it, expressly or by implication, by the law of its creation; yet it may become legally bound to observe and perform contracts which it had not authority to enter into. The ends of justice may require, as in this case, that the corporation which has exceeded its powers should be estopped by its own acts from pleading, in defense of its assumed obligations, that they were *ultra vires*. "To apply the principle of estoppel is not to enlarge the powers of the corporation; nor does it give warrant to a corporation to disregard or violate the re-

strictions which have been expressly imposed upon it, or which exist in the absence of power conferred. It was said by the court in Bradley *v.* Ballard, 55 Ill. 413: 'This doctrine [estoppel] is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been acomplished.' In Railway Co. *v.* McCarthy, 96 U. S. 258, the court say: 'The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.' Whether the plea of *ultra vires* should be allowed as a defense to assumed obligations should not be determined without regard to the character and objects of the corporation, the nature of the powers conferred or withheld, the particular character of the obligations assumed on contract entered into, the relations of the contracting parties, and the *bona fides* of him against whom the doctrine of *ultra vires* is asserted. In this case the defense sought to be made to the note is that in giving it the article of the defendant's incorporation, limiting the amount of its indebtedness, was violated. The debt was incurred in the ordinary prosecution of the business of the corporation. The defendant received and appropriated the money which was the consideration of the note, and having authority to issue negotiable paper, it put forth the note in question, negotiable, calculated to circulate as, and perform the office of, commercial paper, and expressing upon its face the obligation and promise of the maker to pay the bearer, at all events, the sum named. It has come into the hands of a *bona fide* purchaser, and simple justice, as well as plain principles of law, forbid that courts should listen to the plea that in this particular case the corporation had not authority to issue its note. It ought to be and is estopped. To so hold does not weaken the sanction of the law which restrains the exercise of corporate power within the limits prescribed by the creative act. To refuse to recognize and enforce, when necessary to the attainment of justice and prevention of wrong, such contracts, made in violation of the corporate charter, is not to afford a remedy for the wrongful acts of the corporation. When, in a case like this, the unauthorized contract has been executed by the corporation, and it has reaped the benefits of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law. In such a case, the remedy for the violation by the corporation of its charter power lies elsewhere. We are here seeking to administer justice as between these contracting parties. If justice did not invoke the application of other principles of law, the defense of *ultra vires* might be sufficient; but the doctrine of estoppel, as a principle of law, is as positive and well recognized as is the law that a corporation may not exceed its corporate powers, and although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to him who has been misled by its acts, performed within the general scope of its powers. What has been said should be regarded only as said with reference to this case, and should not be considered as stating a rule of law which should prevail generally in the case of contracts not negotiable."

CHAPTER III.

POWER OF AGENTS AND OFFICERS—PUBLIC CORPORATIONS.

§ 91. **General rules.**— Municipal officers have no general authority to bind the corporation. Their authority as agents is special.[1] The contracts of such officers, entered into with its knowledge, though not expressly authorized, will bind the corporation.[2] In like manner as individual and private corporations, municipal or public corporations may make contracts through their officers or agents, appointed properly for the purpose, in all matters that appertain to the corporation. And such contracts may be by parol.[3] Parol contracts made by authorized agents of a municipal corporation, within the scope of its purposes, are express promises of the corporation.[4] But contracts not within

[1] Ross *v.* City of Philadelphia, 115 Pa. St. 222; s. c., 8 Atl. Rep. 398.

[2] Allegheny City *v.* McClurkan, 14 Pa. St. 81.

[3] Duncombe *v.* City of Fort Dodge, (1874) 38 Iowa, 281; City of Indianola *v.* Jones, 29 Iowa, 282.

[4] San Antonio *v.* Lewis, 9 Tex. 69.

the scope of their authority are not enforceable against the corporation.[1] For instance, under the ordinances of a Maryland city, as appeared in this case, the city commissioner could make contracts for grading and paving, and assess taxes for the same in two classes of cases, to wit: (1) Upon application of the proprietors of a majority of front feet, where the street had been condemned; and (2) upon the like application of all the proprietors of ground fronting on the street, where it had not been officially condemned. The Court of Appeals held that without such an application the city commissioner was entirely destitute of the official character and power, in and by which alone he could take any legal proceeding or make any valid contract for grading and paving, and the power of the mayor to approve of his determinations to grade and pave, and of his contracts for the same was limited likewise and controlled by the same conditions; therefore, it followed that a contract made by the city commissioner for grading and paving a street not formally condemned, upon the application of the owners of a majority of feet fronting on it, and not of all the proprietors of ground on it, was an invalid contract, and not binding on the city.[2] The government or other public authority of a municipality will not be bound by acts of public agents, unless it manifestly appears that the agent is acting within the scope of his authority, or he has been held out as having authority to do the act, or has been employed in his

[1] Addis *v.* City, 85 Pa. St. 379; Wahl *v.* Milwaukee, 23 Wis. 272.

[2] Mayor & City Council of Baltimore *v.* Eschbach, (1861) 18 Md. 276. In this case the Court of Appeals of that state have expressed themselves fully upon the principles governing the contracts of public agents in these words: "The fact that the contract made related to a subject within the scope of his powers, does not make it obligatory on the [municipality] if there was a want of specific power to make it. Although a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise. The city commissioner, upon whose determination to grade and pave the contract was made, was the public agent of a municipal corporation, clothed with duties and powers specially defined and limited by ordinances bearing the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him in matters thus conditionally within his official discretion. For this reason the law makes no distinction between the effect of the acts of an officer of a corporation and those of an agent for a principal in common cases. In the latter the extent of authority is necessarily known only to the principal and agent, while in the former it is a matter of record in the books of the corporation or of public law."

capacity as a public agent to make the declaration or representation for the government.[1]

§ 92. **More general rules.**— The legislature of a state investing a public corporation with the power to do certain acts, the governing board of the corporation will have an implied right to use the fit and appropriate means. For instance, where the County Court of a county under the authority conferred upon it to subscribe to the stock of a railroad corporation may make an order for the subscription, they may subsequently make an order appointing an agent to enter the subscription upon the books of the railroad corporation as a proper method for completing the subscription.[2] Where a city has lawful authority, say to construct sidewalks, involved in this authority would be the right to direct the mayor, and the chairman of the committee on streets and alleys, to make a contract on behalf of the city for doing the work.[3] So a municipal corporation, a city, may employ a third person, not an officer or regularly constituted agent, to negotiate for it in procuring a right of way for a ditch, for instance.[4] It is well settled that public officers or agents are held more strictly within the limits of their prescribed powers than private general agents — not only because the extent of their power is more easily seen, but because the rights of large communities are in greater need of diligent guards than those of individuals, whose

[1] Mayor & City Council of Baltimore *v.* Reynolds, (1863) 20 Md. 1. It was said by the court: "Cities and other purely municipal corporations or bodies politic which are allowed to assume some of the duties of the state, in a partial or detailed form, having neither property nor power for the purposes of personal aggrandizement, can be considered in no other light than as auxiliaries of the government, and as secondary and deputy trustees and servants of the people. McKim *v.* Odom, 3 Bland Ch. (Md.) 417; Ang. & Ames on Corp. 11. Agents themselves, not principals, answerable to their constituents, they are not to be presumed to recognize and individually ratify and confirm the acts of their officers, done beyond the scope of their authority. Acts of ratification by such bodies politic should be direct, explicit, unequivocal, with full knowledge of the facts."

[2] Hannibal & St. Joseph R. R. Co. *v.* Marion County, (1865) 36 Mo. 294. The court said: "The County Court * * * has the control and management of the property, real and personal, of the county. It is the agent of the county, and may lawfully and of right do whatever is necessary to carry out and execute the trusts reposed in it."

[3] Hitchcock *v.* Galveston, (1877) 96 U. S. 341.

[4] Stewart *v.* City of Council Bluffs, (1882) 58 Iowa, 642.

selfishness is quite apt to hold in frequent review the acts of all employees.[1] It is well settled that the fact that the contract made by a public agent, related to a subject within the general scope of his powers, does not bind his principal, if there was a want of specific power to make it. Although a private agent acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise.[2] From this it follows that one who contracts or deals with the agents or officers of a municipal or public corporation must, *at his peril*, take notice of the limits of their powers.[3] The United States Supreme Court has approved the rule as declared by Judge DILLON in his work on Municipal Corporations, section 283, in these words: "As a *general rule*, it may be stated that not only where the corporate power resides in a *select body*, as a city council, but where it has been delegated to a *committee* or *agents*, then, in the absence of special provisions otherwise, a *minority* of the select body or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or of all of the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such a case, a majority part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease."[4]

[1] Parsel *v.* Barnes & Bro., (1868) 25 Ark. 261.

[2] Ibid. Mayor, etc., of Baltimore *v.* Reynolds, (1862) 20 Md. 1; Delafield *v.* State of Illinois, (1841) 26 Wend. 192.

[3] Mayor, etc., of Baltimore *v.* Musgrave, (1877) 48 Md. 272; State ex rel. Mayor, etc., *v.* Kirkley, 29 Md. 85; Horn *v.* Mayor, etc., 30 Md. 218. See, also, The Floyd Acceptances, (1868) 7 Wall. 666; Marsh *v.* Fulton County, (1870) 10 Wall. 676; Clark *v.* Des Moines, (1865) 19 Iowa, 199, 210; Treadwell *v.* Commissioners, (1860) 11 Ohio St. 183; Gould *v.* Sterling, 23 N. Y. 464; Starin *v.* Genoa, 23 N. Y. 439, 452; People *v.* Mead, 36 N. Y. 224; Dodge *v.* County of Platte, 82 N. Y. 218; United States *v.* City Bank of Columbus, (1858) 21 How. 356; DeVoss *v.* Richmond, (1868) 18 Gratt. (Va.) 339; Lewis *v.* Barbour Co. Comrs., 3 Fed. Rep. 191.

[4] Brown *v.* District of Columbia, (1888) 127 U. S. 579, 586. This rule is supported by the following cases: Day *v.* Green, (1849) 4 Cush. 433; Fisher *v.* Attleborough, (1849) 4 Cush. 494; Kingsbury *v.* School District, (1846) 12 Met. 99; Coffin *v.* Nantucket, (1850) 5 Cush. 269; Damon *v.* Granby,

§ 93. Illustrations of the duty and powers of municipal officers.— A city comptroller, being required to perform "such duties in relation to the finances" as "shall be prescribed by ordinance," would be authorized, upon an ordinance properly passed giving him the power, to negotiate and dispose of city bonds. It is his official duty, when such bonds are in his hands in shape to be negotiated, to keep them safely, until he lawfully disposes of them, and an unauthorized disposition of such bonds will subject him and sureties to liability upon his bond for the proceeds.[1] The common council of a city being given the power by its charter to audit and allow accounts, and the comptroller being only permitted by the charter to receive, examine and report upon them, the comptroller has no power to modify a contract on the part of the city.[2] A director of the poor appointed by the council of a city, his duties and powers being expressly such as officers of like kind in townships, has no power to bind the city by a contract with a surgeon to perform a surgical operation upon a pauper for a fixed sum.[3] A city charter providing that no moneys could be lawfully paid out of its treasury, except upon warrants regularly drawn according to the charter, its treasurer cannot justify any payments of moneys made by him otherwise, as to contractors, for instance, doing work for the city.[4] A mayor and council of a city have no authority to contract with a city treasurer that the latter may use the funds of the city and pay a percentage therefor; such a contract would be illegal and void, and would not authorize the treasurer to so use the funds.[5] A city cannot be made liable, by a resolution of the city aldermen, for the expense of defending contempt proceedings against its aldermen who have been convicted of contempt in disobeying an injunction, the conviction not having been reversed.[6] In entering into a contract for the grading of a street a street commissioner of a city has no power to contract, except according to

(1824) 2 Pick. 345, 355; State *v.* Jersey City, 27 N. J. Law, 493; Charles *v.* Hoboken, 27 N. J. Law, 203; Dey *v.* Jersey City, (1869) 19 N. J Eq. 412; Mayor, etc., of Baltimore *v.* Poultney, (1866) 25 Md. 18.

[1] Stevenson *v.* Bay City, (1872) 26 Mich 44.

[2] Advertiser & Tribune Co. *v.* Detroit, 43 Mich. 116; s. c., 5 N. W. Rep. 72.

[3] Barber *v.* City of Saginaw, (1876) 34 Mich. 52.

[4] McCormick *v.* Bay City, (1871) 23 Mich. 457.

[5] Manley *v.* City of Atchison, (1872) 9 Kans. 358.

[6] West *v.* City of Utica, 71 Hun, 540; s. c., 24 N. Y. Supp. 1075.

the resolution of the common council directing the doing of the work under his direction, and the proposals and estimates received in pursuance of the advertisement of the same.[1] There being no limitation of the power of a city to make purchases for fitting up rooms for the use of city officers, and no particular manner for making contracts for such a purpose prescribed in its charter, the city council may confer the power on a committee, as the act to be performed would be a mere business act, and not of the class relating to the government of the city, which they could not delegate.[2] Where an order was given by a single member of a committee appointed by a city council to perform a business act, for work to be done and goods furnished, the New York Court of Appeals held that the city, having enjoyed the benefit of the same, was liable for the work and goods on a *quantum meruit.*[3] Under a city charter in California authorizing the library board "to control and order the expenditure of all moneys at any time in the library fund," and "generally to do all that may be necessary to carry out the spirit and intent of this charter in establishing a public library and reading room," the Supreme Court of that state has held that the library board might appropriate money to pay the expense of a delegate to a congress of librarians.[4]

§ 94. **Ratification by municipal corporations of contracts made by their agents or officers.**—A contract, neither immoral nor unlawful, entered into by an agent of a municipal corporation, and such as it might make itself, may be ratified by the corporation, as by an individual, either formally or by its conduct.[5] The contract of a municipal corporation, which is invalid when made, as in violation of some mandatory requirement of its charter, can be ratified only by an observance of the conditions essential to a valid agreement in the first instance.[6] But where the forms and conditions prescribed are not intended as a

[1] Bonesteel *v.* City of New York, (1860) 22 N. Y. 162, affirming Bonesteel *v.* City of New York, 6 Bosw. 550.

[2] Kramrath *v.* City of Albany, (1891) 127 N. Y. 575; s. c., 28 N. E. Rep. 400.

[3] Ibid.

[4] Kelso *v.* Teale, (Cal. 1895) 39 Pac. Rep. 948.

[5] City of Findlay *v.* Pertz, (U. S. C. C. A. 1895) 66 Fed. Rep. 427.

[6] Gutta-Percha & Rubber Manuf. Co. *v.* Village of Ogalalla, (Neb. 1894) 59 N. W. Rep. 513; citing Town of Durango *v.* Pennington, 8 Colo. 257; s. c., 7 Pac. Rep. 14; McCracken *v.* City of San Francisco, 16 Cal. 623; San Diego Water Co. *v.* City of San Diego, 59 Cal. 522; Cory *v.* Board, 44 N. J.

limitation upon the powers of the corporation, a compliance with such conditions is not essential to a binding ratification.[1] A corporation retaining and using money borrowed for it by its officer in excess of his authority ratifies the transaction and is liable.[2] A public corporation cannot, by subsequent ratification, make good an act of an agent which it could not have directly authorized.[3] A contract made in behalf of a municipal corporation, void in its inception from want of authority in the officer to make it, cannot be validated by the subsequent approval of the council.[4] A school district, by its action in completing a school building, left unfinished by an absconding contractor, by furnishing the building with desks, seats and other necessary schoolhouse furniture, by occupying the building for school purposes and insuring the

Law, 445; Keeney *v.* Jersey City, 47 N. J. Law, 449; s. c., 1 Atl. Rep. 511; Newman *v.* City of Emporia, 32 Kans. 456; s. c., 4 Pac. Rep. 815; McBrian *v.* Grand Rapids, 56 Mich. 103; s. c., 22 N. W. Rep. 206; McDonald *v.* Mayor, etc., 68 N. Y. 23; Smith *v.* City of Newburgh, 77 N. Y. 130; Bank *v.* South Hadley, 128 Mass. 503.

[1] Gutta-Percha & Rubber Manuf. Co. *v.* Village of Ogalalla, (Neb 1894) 59 N. W. Rep. 513. An action to recover the value of goods sold to the village.

[2] Willis *v.* St. Paul Sanitation Co., (1893) 53 Minn, 370; s. c., 55 N. W. Rep. 550. In White *v.* City of Rahway, 11 Fed. Rep. 853, it appearing that the treasurer of a city, under the board of finance, borrowed of a bank a sum of money and the city ratified the loan made by its agent by a renewal of the note from time to time, and by payments upon it at different times, and when the note was executed by the treasurer he pledged as security for its payment bonds of the city, subsequently substituting therefor other ten-year bonds of the city, and there remaining a sum due and unpaid upon the note, it was held in the federal court that under the laws of New Jersey the treasurer was authorized, under the board of finance, to make the loan, and that there could be a recovery upon the note without first disposing of the collaterals. As to what would show a valid contract by ratification on the part of the county, see Leon County *v.* Vann, (Tex. 1894) 27 S. W. Rep. 258.

[3] Hodges *v.* City of Buffalo, 2 Denio, 110; Halstead *v.* Mayor, etc., of New York, 3 N. Y. 430; Boom *v.* City of Utica, 2 Barb. 104; Cowen *v.* Village of West Troy, 43 Barb. 48. When a ratification will bind the corporation, see Peterson *v.* Mayor, etc., of New York, 17 N. Y. 449; People *v.* Flagg, 17 N. Y. 584; s. c., 16 How. Pr. 36. In Scott's Exrs. *v.* Shreveport, 20 Fed. Rep. 714, it was held that the agent of the city, having no authority to bind the city by giving a note, for lack of power in the city to raise money to donate to a railroad company, the obligation could not be made binding on the corporation by any subsequent act of the municipal authorities.

[4] Ruggles *v.* Collier, (1869) 43 Mo. 353. As to ratification of contract of an agent by a municipal corporation, see McCloskey *v.* City of Albany, 7 Hun, 472. Where it cannot be inferred, see Burns *v.* Mayor of New York, 5 T. & C. 371.

same, will ratify and make binding upon the district a contract for constructing the school building void because made by only one member of the school board.[1] So a school district which had received, retained and used for a long period of time school furniture bought for it by the members of the school district board, acting separately without any meeting of the board, has been held to have ratified the purchase and a recovery allowed upon the contract against the district.[2] he Appellate Court of Missouri has held that, as the board of directors of a school district can act only when assembled in a meeting as a board, and neither two nor all can bind the district by a contract, the fact that furniture purchased by them under a contract made outside of a board meeting had been placed in the schoolhouse and used would not amount to a ratification of this illegal contract.[3]

§ 95. **Agents and officers of counties — generally.**— The character of the agency which the officers of a county hold in connection with its financial affairs is well expressed and defined by the Iowa Supreme Court in an early case when the county judge was charged with the management of the affairs of a county in that state. They said: "The analogy between this officer and an agent will hold good but a little way. It does not hold good in any valuable sense. It is true that the statute in creating him styles him the general agent of the county. But this is not to institute this relation properly. It was to declare him to be the general rather than the special agent. At the best he is but a *quasi* agent. Properly speaking, he has no principal, and so far as he has, this principal only appoints him and has no further power over him. He does not derive his powers from the county but from the law, and the county cannot revoke them. It cannot act itself in any case. He is the head and hand of the county. In short, he is an officer of the law, deriving his powers from the law, and governed by it."[4] The governing boards of counties are known under different titles in the different states.

[1] School District No. 39 in Brown County *v.* Sullivan, (1892) 48 Kans. 624; s. c., 29 Pac. Rep. 1141.

[2] Union School Furniture Co. *v.* School District No. 60 of Elk County, (1893) 50 Kans. 727; s. c. 32 Pac. Rep. 368.

[3] Thomas Kane & Co. *v.* School Dist. of Calhoun, (1893) 48 Mo. App. 408.

[4] Clapp *v.* County of Cedar, (1857) 5 Iowa, 15, 55, a case involving the authority of a county judge in the issuance of county bonds in payment of a subscription to the stock of a railroad company.

County Courts in some, board of county commissioners in others; supervisors in some and boards of chosen freeholders in others, as well as other titles. We will give some illustrations in this chapter of the powers of these different officers in the financial management of the counties from different state decisions which may guide in determining the powers of similar officers in any other state. The County Court in Arkansas may levy a tax for the payment of a judgment recovered against a county for a valid debt evidenced by warrants duly issued by the county authorities.[1] In affirming an order for a peremptory writ of *mandamus* to compel a county treasurer to pay certain warrants issued by order of a board of county commissioners, the Colorado Court of Appeals has held that a county treasurer is not clothed with power to pass on the legality of the action of the governing body of the county. "Power to determine the validity of all claims," they said, is intrusted to the board. When they have audited and allowed a claim, and a warrant is issued in accordance with their determination, we cannot see that the statute has clothed the treasurer with the supervisory power to determine the validity of their acts.[2] County commissioners cannot legally transact county business except at a regular session of the county board or one specially called by the county clerk, of which notice is given in the mode provided by law.[3] The money in the hands of a county treasurer in Nebraska under the revenue bond road laws of that state, being held in trust by the treasurer for the road districts, the board of county commissioners have no authority

[1] Bush *v.* Wolf, (1891) 55 Ark. 124; s. c., 17 S. W. Rep. 709.

[2] Beeney, County Treasurer, *v.* Irwin,(Colo. App. 1895) 39 Pac. Rep. 900. Leading up to their conclusion, the court used this language: As we said in Commissioners *v.* Lee, 3 Colo. App. 177; s. c., 32 Pac. Rep. 841: "Under the statutory plan which divides the state into counties and regulates the government of those territorial subdivisions all power to fix, control, determine, or in any manner dispose of the funds of a county, is devolved on the board of county commissioners. They alone have the right to disburse the public moneys and to decide in what cases and under what circumstances such funds shall be paid out, unless it be in those cases where fixed rights are conferred by statute. In and of itself this fact should be decisive of the present inquiry. Wherever a broad, universal and sweeping power is thus given to a governing body it cannot be conceded that, by implication, any other body, whether it be a court or one resembling the board of county commissioners, should likewise have power to dispose of the public revenues."

[3] Morris *v.* Merrel, (Neb. 1895) 62 N. W. Rep. 865.

to draw warrants against such funds.[1] Under the New Jersey statutes in regard to such matters, a board of chosen freeholders are not empowered to make an excessive appropriation for some particular class of expenditures that it, with the surplus, may make up deficiencies in other classes of expenditures.[2] Under the statute of New Jersey, a board of chosen freeholders can improve any ordinary highway under their control only with money obtained from the sale of road bonds.[3] A county commissioners' court in Texas by electing, with knowledge of a contract of a county judge to purchase county bonds for the permanent school fund, to carry out its provisions and to hold the bonds, has been held to be a ratification of the contract.[4] The Washington Supreme Court has held that a board of county commissioners in that state, having power to contract for the services of a county physician, though their term of office be about to expire, may contract with a physician for one year extending into the term of office of their successors.[5] The different statutes of Utah, the one which empowers the County Court in Utah to lay out and maintain public roads and perform other acts from which indebtedness must arise; another which provides that no county shall incur any indebtedness or liability in any manner or for any purpose to an amount exceeding, etc.; another, that the County Court must not contract liabilities except in pursuance of law, and the one which provides that warrants drawn by order of such court must specify the liability for which they are drawn, have been held by the Supreme Court of that territory to confer by implication on the County Court the power to create indebtedness against the county.[6]

§ 96. **Power of county officers in California.**— A board of supervisors of a county have no power to create a debt or liability on the part of the county for any purpose except as provided by law.[7] And no order made by a board of supervisors is valid or binding unless it is authorized by law; thus, if they allow claims

[1] Oakley *v.* Valley County, (Neb. 1894) 59 N. W. Rep. 368.

[2] City of Paterson *v.* Board of Chosen Freeholders, (N. J. 1894) 29 Atl. Rep. 331.

[3] Ibid.

[4] Boydston *v.* Rockwall County, (1894) 86 Tex. 234; s. c., 24 S. W. Rep. 272.

[5] Webb *v.* Spokane County, (Wash. 1894) 37 Pac. Rep. 282.

[6] Fenton *v.* Blair, (Utah, 1895) 39 Pac. Rep. 485.

[7] Foster *v.* Coleman, (1858) 10 Cal. 278.

not legally chargeable to a county, neither the allowance nor the warrants drawn therefor create any legal liabilities.[1] They are authorized to erect a county jail without a law authorizing the levy of a special tax therefor, and the expenses of such erection, as among the expenses of a current year, may be paid for out of the money raised by the general tax which the board are authorized to levy. And a contract entered into by a board of supervisors for this purpose, for and on behalf of the county, and signed by the chairman of the board, would be the contract of the county.[2] So far as concerns the examination and settlement of accounts and claims against a county, its board of supervisors are a *quasi* judicial body, and the allowance and settlements of such a board is an adjudication of the claims, and is conclusive. And an auditor of a county cannot assume to set up his judgment in opposition to that of a board of supervisors in respect to the issuance of a warrant on an account against the county, except in cases where the board have exceeded their powers.[4] Nor can he refuse to issue a warrant when the board of supervisors has ordered its issue, because the person in whose favor it is to be drawn, and whose account has been allowed, has committed a fraud on the county in relation to procuring the contract on which the warrant is to be issued.[5] If by a contract of a board of supervisors for the erection of a county jail it be provided that the work and labor be paid for in installments, on the certificate of the architect that a certain sum has been expended, an account giving the sum total of an installment, without "all the items of the claim" certified by the architect, would be a sufficient compliance with the statute (Pol. Code Cal. § 4072) to authorize the board to allow the same.[6] It cannot set apart a portion of the revenue of the county as a fund for current expenses.[7] They have no authority to allow an unaudited claim against a county, except within one year after the claim accrues and becomes due.[8] The board must first give public notice of a special meeting at which it proposes to settle with the county treasurer, and specify

[1] Linden *v.* Case, (1873) 46 Cal. 171.

[2] Babcock *v.* Goodrich, (1874) 47 Cal. 488.

[3] El Dorado Co. *v.* Elstner, 18 Cal. 144; Tilden *v.* Sacramento Co., 41 Cal. 68; Colusa County *v.* De Jarnett, 55 Cal. 373.

[4] Babcock *v.* Goodrich, (1874) 47 Cal. 488.

[5] Ibid.

[6] Ibid.

[7] Laforge *v.* Magee, 6 Cal. 285.

[8] Carroll *v.* Siebenthaler, 37 Cal. 193.

in the notice that such business will be transacted; otherwise they cannot settle with the officer.[1] Unless specially authorized by law, the board cannot allow the salary of a county treasurer out of county funds.[2] A county treasurer, authorized to advertise for bids for the surrender of bonds of the county, in order that he may redeem them with money in the treasury, has no authority in the advertisement to insert a condition upon which bids will be received, which is not to be implied from the duty to advertise, and which is not necessary to the exercise of his authority, such as that the bonds must accompany the bid.[3] The County Government Act of California authorizes the county boards of supervisors to issue bonds, and provides that the bonds shall be delivered to the county treasurer, by whom they shall be sold to the highest bidder. Under the section of that act, which further authorizes these boards to do "all other acts and things * * * which may be necessary to the full discharge of the duties of the legislative authority of county government," they have been held to have no power to employ an agent to procure bids to be made for such bonds.[4]

§ 97. **Power of county boards in Illinois.**—The governing authorities of a county, elected by the people and becoming their agents for the management of the financial affairs of the county, when they act within the scope of their authority, however indiscreet the action, it is binding upon the county. In an Illinois case, the agents making the contract for a county jail for a price in excess of what was ordered by the County Court, yet the County Court, acting as such, having received the jail and appropriated it to the use of the county, and acknowledged that the county owed the contractors the balance due upon the contract price, this final action of the County Court was held to bind the county to pay the full amount due the contractors, notwithstanding the fact that those making the contract exceeded their authority so far as the price fixed for the cost of the building was concerned.[5] Only such powers can be exercised by County Courts, when sitting for the disposition of county busi-

[1] El Dorado Co. *v.* Reed, 11 Cal. 131.

[2] County of San Joaquin *v.* Jones, 18 Cal. 327.

[3] Mills *v.* Bellmer, (1874) 48 Cal. 124.

[4] Smith *v.* Los Angeles County, (1894) 99 Cal. 628; s. c., 34 Pac. Rep. 439.

[5] County of Jackson *v.* Hall, (1870) 53 Ill. 440.

ness, as have been conferred on them by express law or that it may be necessary to exercise in order to carry into effect the powers granted to them. So, where an act to enable counties to liquidate their debts provides that the County Courts or other governing boards may levy a special county tax for that purpose, the county board has no authority to take up its outstanding orders and give bonds in the place of them, bearing interest. Such obligations cannot be issued without express statutory authority. Another statute, under which the board would be acting in such case, would confine the court to a liquidation through a levy of taxes for that purpose.[1] A county board having authority to contract for the repair of a county court house and building of fire-proof vaults, in the absence of any restrictions of law as to the amount of the price they should pay or its mode of payment, it is open to such board to contract to pay for such work in interest-bearing orders as well as in non-interest-bearing orders.[2] The governing authorities of a county, intrusted with exclusive power over the county revenues and their collection, if, in their judgment a tax already ordered be found to be unnecessary, have a right to rescind the order and arrest the collection of such tax.[3] They are not authorized to allow in a settlement with him to a collector more than the sum fixed by law as fees or commissions, and an allowance of the kind does not bind the county, nor is the county estopped by the action of the board to object to such allowance.[4] It being their duty to protect the county's interest, they have the power to appoint agents, to employ counsel, and make legal contracts for procuring information and evidence necessary and proper in defense of suits against the county.[5] The power given by statute to the board of county commissioners to construct a court house, for instance, and connected with it the power to make contracts for its construction, carries with it of necessity the power to exercise its discretion of settling and adjusting claims against the county arising from such construc-

[1] County of Hardin *v.* McFarlan, (1876) 82 Ill. 138.

[2] County of Jackson *v.* Rendleman, (1881) 100 Ill. 379, holding such orders valid and the interest collectible. The court distinguished County of Hardin *v.* McFarlan, 82 Ill. 138, 141, and Hall *v.* Jackson County, 95 Ill. 352.

[3] People ex rel. Chase *v.* County Court of Macoupin County, (1870) 54 Ill. 217.

[4] Board of Supervisors of Cumberland County *v.* Edwards, (1875) 76 Ill. 544.

[5] Gillett *v.* Board of Supervisors of Logan County, (1873), 67 Ill. 256.

tion, and in case, under this power, in the use of their discretion, a board has settled and compromised a claim about which there was dispute, in the absence of anything showing fraud or corruption on their part, a court of equity has no jurisdiction to prevent the consummation of the agreement of the board for a compromise by process of injunction.[1]

§ 98. Power of county commissioners in Indiana.—The board of county commissioners in Indiana is a body corporate and politic, under the statute. The statute authorizes the board to make contracts, and it may make them by parol in some cases, and be bound thereby; but it cannot make contracts of all descriptions and for all purposes for which natural persons may. It is confined in making contracts to the powers expressly granted to it by the act of its creation, and to the implied powers, incidental and necessary to the execution of such expressed powers and the performance of the duties enjoined upon it. For these purposes, it may make contracts, and it will be bound to perform them the same as individuals.[2] The law of Indiana conferring no powers, and enjoining no duty, upon the board of commissioners of a county to aid in the arrest, prosecution or

[1] Harms *v.* Fitzgerald, (1878) 1 Bradw. (Ill.) 325. In support of this rule, see Attorney-General *v.* Aspinall, 2 Mylne & C. 618; Parr *v.* Attorney-General, 8 Clark & F. 409; Attorney-General *v.* Poole, 4 Mylne & C. 17; Attorney-General *v* Lichfield, 13 Sim. 547; Attorney-General *v.* Norwich, 16 Sim. 225; Mooers *v.* Smedley, 6 Johns. Ch. 28; Livingston *v.* Hollenbeck, 4 Barb. 10, 14; Meserole *v.* Mayor & Common Council of Brooklyn, 8 Paige, 198; Gillespie *v.* Broas, 23 Barb. 370; Andrews *v.* Board of Supervisors Knox County, 70 Ill. 65; City of Galena *v.* Corwith, 48 Ill. 423; Brush *v.* City of Carbondale, 78 Ill. 74; Conrad *v.* Trustees of Ithaca, 16 N. Y. 168; Storrs *v.* City of Utica, 17 N. Y. 104. As to the power of county board, see Prest. and Trustees of Town of Petersburg *v.* Mappin, 14 Ill. 193. That the decision of the board in such a matter is final, see Supervisors of Orleans *v.* Bowen, 4 Lans. 24, 33; Shank *v.* Shoemaker, 18 N. Y. 489; Russell *v.* Cook, 3 Hill, 504; Stover *v.* Mitchell, 45 Ill. 213; County Comrs. of Lucas County *v.* Hunt, 5 Ohio St. 488.

[2] Hight *v.* Board of Comrs. Monroe County, (1879) 68 Ind. 575; citing Seibrecht *v.* City of New Orleans, 12 La. Ann. 496; Douglass *v.* Mayor & Bd. of Aldermen of Virginia City, 5 Nev. 147; Hayward *v.* Davidson, 41 Ind. 212; McCabe *v.* Board of Commissioners of Fountain County, 46 Ind. 380; Burnett *v.* Abbott, 51 Ind. 254; Gordon *v.* Board of Comrs. Dearborn County, 52 Ind. 322; Board of Comrs. Jackson County *v.* Applewhite, 62 Ind. 464; Board of Comrs. Jennings County *v.* Verbarg, 63 Ind. 107.

conviction of a person charged with the commission of crime, either by an offer of reward or by the employment of detective or professional skill, a contract by such a board to pay a reward for the arrest of a criminal has been held to be beyond its powers and not enforceable against the county.[1] A county board cannot authorize the county treasurer to employ an attorney to assist in the collection of delinquent taxes, at the county expense.[2] County boards have no authority to make allowances for services done or things furnished voluntarily for which they cannot lawfully contract.[3] Should such improper allowances be made, relief may be had from it by an appeal.[4] County boards may contract for an examination and adjustment of the accounts of a

[1] Board of Comrs. of Grant Co. *v.* Bradford, (1880) 72 Ind. 455. The court considered the case within the principle of Hight *v.* Board of Commissioners of Monroe County, (1879) 68 Ind. 575, where it was held that such board had no power to employ a person to aid the state's attorneys in prosecuting, and procuring to be prosecuted, a person charged with crime. To the same effect, see Board of Comrs. Ripley County *v.* Ward, (1880) 69 Ind. 441, holding that the board had no power to employ an attorney to assist in the prosecution of one under indictment for embezzling county funds.

[2] Miller *v.* Embree, (1882) 88 Ind. 133.

[3] Ibid.

[4] Board of Comrs., etc., *v.* Gregory, 42 Ind. 32; Grusenmeyer *v.* City of Logansport, 76 Ind. 549; Rothrock *v.* Carr, 55 Ind. 334. See Waymire *v.* Powell, (1885) 105 Ind. 328, holding an allowance by a board of commissioners to one or more of its members for services rendered in inspecting, examining and measuring the abutments of a bridge which had been built under a contract made with the board, to be an illegal allowance, and that any person interested had a right to appeal from such allowance. The court said: "[The statute] provides that 'The boards of commissioners may make allowances at their discretion,' etc., but, as was said, in Rothrock *v.* Carr, 55 Ind. 334, this does 'not mean an arbitrary, uncontrolled, unlimited discretion, contrary to law, or without authority of law; for where there is no law there is no act to do, and, therefore, no discretion to be exercised.' The discretion, therefore, must be according to and in subordination to the law, and not outside and in violation of it." English *v.* Smock, 34 Ind. 115; S. C., 7 Am. Rep. 215. * * * "Where the board of commissioners of their own motion do an act which under the law they may do or not, as in the exercise of their discretion seems best, and the time and mode of doing the act are not prescribed by law, no appeal lies from their decision in such a case. But when they make an allowance which is illegal and appears so on its face, any one aggrieved may appeal." In the cases of Nichols *v.* Howe, 7 Ind. 506; Board of Comrs., etc., *v.* Boyle, 9 Ind. 296; Sims *v.* Board of Comrs., etc., 39 Ind. 40; Moffit *v.* State ex rel., 40 Ind. 217; Board of Comrs., etc., *v.* Richardson, 54 Ind. 153, where such an appeal was denied, the allowances were for services which might have been made the subject of a contract.

county treasurer.[1] The county commissioners have no power to declare, even by express contract, a man's taxes paid before they are assessed, and merely ministerial officers, such as the treasurer and auditor, have no such authority.[2] Among the powers of such boards fixed and designated by law is not the right to interfere with, or in any way affect, the course marked out for the collector or treasurer of the county. They can neither abridge nor enlarge the duties or liabilities of those officers. It follows that an order of such a board giving the collector of the county revenue a longer time for payment of the revenue of the year than the law prescribes, would be without authority, and inoperative.[3] A board of county commissioners, under the statutes, have no power to direct the county treasurer how, or where, he shall keep the county funds; and if a county treasurer, under an order of such board, they having purchased an iron safe, keep the county funds in such safe, this order, being without authority, would not release the collector from his liability to the county to make good the loss, in case the funds be stolen from the safe.[4] County commissioners in Indiana are not empowered by the statute relating to proceedings to secure free gravel roads to order payments of fees of attorneys rendered to the petitioners for such roads.[5]

§ 99. **Power of supervisors of counties in Iowa.**— County boards of supervisors must act as a board in session in order to bind a county, they not being authorized to bind the county by a

[1] Duncan *v.* Board of Comrs. of Lawrence County, (1884) 101 Ind. 403. It was said: "The board of commissioners have very full powers in reference to the management of the affairs of their respective counties. It is, for all financial purposes, the county, and its contract in relation to the adjustment of the finances of the county is the contract of the county, and valid as such." See Hoffman *v.* Board, etc., 96 Ind. 84; Moon *v.* Board, etc., 97 Ind. 176; Nixon *v.* State ex rel., 96 Ind. 111.

[2] Scobey *v.* Decatur County, (1880) 72 Ind. 551.

[3] Coman *v.* State ex rel. Armstrong, (1836) 4 Blackf. (Ind.) 241.

[4] Halbert *v.* State ex rel. Board of Comrs. Martin County, (1864) 22 Ind. 125. As to contracts in relation to bridges entered into by county boards or superintendents appointed by the board, see Board Comrs. Carroll County *v.* O'Conncr, (1894) 137 Ind. 622; s. c., 37 N. E. Rep. 16; Smith *v.* Comrs., 6 Ind. App. 153. As to county board contracting with a physician for services in attending the poor, see Woodruff *v.* Comrs. of Noble County, (1894) 10 Ind. App. 179; s. c., 37 N. E. Rep. 732.

[5] Board of Comrs. of Rush County, *v.* Cole, (1891) 2 Ind. App. 475; s. c., 28 N. E. Rep. 772.

contract made by them individually.[1] That a contract made with a board of supervisors be entered on the supervisors' record is not necessary to its validity, as the contract may be proved by parol.[2] There is no authority in the chairman of the board of supervisors to contract with an attorney for services in a suit in which the county is interested, but the board of supervisors may confer such authority upon the chairman, and, in case this is done, such a contract would bind the county.[3] A county has been held not to be bound by a contract for building materials for a public building, made by the chairman of a building committee who was also chairman of the board of supervisors of the county, as there was shown no special authority from the board to him to make such contract, and such authority could not be inferred from the simple facts that he was chairman of the building committee and of the board of supervisors.[4] Further, that no obligation could be created against the county by an assurance of the chairman of the board that they would pay the bill, as to bind the county a majority of the members must assent to such an assurance.[5] These boards have power, implied from their power under statutes "to represent their respective counties, and to have the care and the management of the property and business of the county in all cases where no other provision is made," to employ one to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty.[6] It has been held that they have the power to offer a reward for the recovery of money stolen from the county, by necessary implication from the statutes giving them full control of county property, and the care and management thereof;[7] but not for the arrest of persons charged with the commission of crime.[8]

[1] Jordan *v.* Osceola County, (1882) 59 Iowa, 388; s. c., 13 N. W. Rep. 344.

[2] Ibid., following Tatlock *v.* Louisa County, 46 Iowa, 138. The same rule recognized in Baker *v.* Johnson County, 33 Iowa, 151, 153; Rice *v.* Plymouth County, 43 Iowa, 136.

[3] Tatlock *v.* Louisa County, (1877) 46 Iowa, 138.

[4] Rice *v.* Plymouth County, (1876) 43 Iowa, 136.

[5] Ibid.

[6] Wilhelm *v.* Cedar County, (1878) 50 Iowa, 254.

[7] Hawk *v.* Marion County, (1878) 48 Iowa, 472.

[8] Ibid. The court said: "It is the duty primarily of the state to cause the arrest and conviction of criminals, in the performance of which the state makes use of such officers and agencies as it sees proper, and, if the general assembly saw proper, there is no doubt a duty in respect thereto could be legitimately imposed on counties.

§ 100. **Power of county commissioners in Kansas.**— After a vote of the people in favor of it, county commissioners have power to borrow money to meet the current expenses of the county in case of a deficit in the county revenue and to issue the bonds of the county for the loan.[1] It is within the scope of the authority of a board of county commissioners to determine whether an election has been had authorizing them to subscribe stock in a railroad company, and to subscribe such stock when such election has been held, and to make all necessary orders with reference to the matter.[2] The county commissioners alone possess the power to contract for the county or to create an indebtedness against the county for articles, as mattings for the floor, for instance, to be used about the court houses.[3] And the board will not be bound for a debt created for such purposes by the court or the sheriff of the county, without the consent of the county commissioners.[4] They have no power to appropriate the fund raised by taxation to defray county charges and expenses of the current year to the erection of permanent county buildings.[5] And in case a board has contracted for the erection of permanent county buildings, when it was beyond their power as county officers to make such contracts, and propose to carry out the terms of the contract at the cost of the county, and to use the general revenue fund to pay for the work done under such contract, they may be restrained by injunction from erecting the buildings, or from drawing any warrants on the county treasurer on account of the contract.[6] Medical services to prisoners confined in county

But instead of doing so, the statute expressly authorizes the governor, in the certain specified cases, to offer a reward for the apprehension of persons charged with crimes of murder or arson. Code, § 58. The statutes in Maine, as to the power of towns, in this respect, are much like ours as to counties, and there also the governor is authorized to offer rewards in certain cases. It was held in Gale *v.* South Berwick, 51 Me. 174, that towns in that state had no power to offer rewards for the arrest of criminals. Such seems also to be the rule in Illinois. County of Crawford *v.* Spenney, 21 Ill. 288. But a contrary rule was adopted in Borough of York *v.* Forscht, 23 Pa. St. 391, on the ground that the burgesses of the borough were a part of the public police. Janvrin *v.* Town of Exeter, 48 N. H. 83, is not applicable because the power in that state is conferred by statute, and such is true as to Crawshaw *v.* City of Roxbury, 7 Gray, 374."

[1] Doty *v.* Ellsbree, 11 Kans. 209.

[2] State ex rel. *v.* Allen, 5 Kans. 213.

[3] Neosho County *v.* Stoddart, 13 Kans. 207.

[4] Ibid.

[5] State ex rel. *v.* Marion County, 21 Kans. 419.

[6] Ibid.

jails must be authorized by the county board, otherwise the county will not be liable for them.[1] A county having no poor-house may be bound by a township trustee to pay for medical services furnished to a poor person, who is a resident of the county and township, and who is temporarily a pauper.[2] The allowance of a claim against a county by its county commissioners is not final and conclusive. The board itself may re-examine it, and, on appeal, it may be examined and disallowed in whole or in part by the court to which the right of appeal in such cases is given.[3] Where a claim against a county has been disallowed in whole or in part by the county commissioners, it is the right of the claimant to appeal to the District Court or to commence an original action for it.[4] Two members of a board of county commissioners cannot enter into a contract to bind the county, outside of the county, without previous authority from the board.[5] Under the statute of Kansas empowering the county commissioners of a county "to purchase at their true value any and all bridges built upon the public highways of said county by any township or private person or persons, and pay for the same in county bonds," they have no authority to purchase such bridges and pay for them with county warrants or orders; nor have they power to purchase such bridges at the original cost of their construction, where that cost exceeds the "true value" of the bridges.[6]

§ 101. **Power of County Courts in Kentucky.**— County courts have no power to impose a tax in aid of a railroad on the people of a county or to submit the question of taxation to popular vote without some special legislative enactment authorizing it.[7] Such courts have power to employ counsel to defend a suit against the counties and test the validity of a subscription of the counties to a private corporation and to bind the counties for a reasonable fee.[8] And in a suit by the attorney for the recovery

[1] Roberts *v.* Pottawatomie County, 10 Kans. 29.

[2] Board of Comrs. of Clay County *v.* Renner, 27 Kans. 225.

[3] Leavenworth County *v.* Keller, 6 Kans. 510.

[4] Leavenworth County *v.* Brewer, 9 Kans. 307.

[5] Board of Comrs. of Hamilton Co. *v.* Webb, (1891) 47 Kans. 104; s. c., 27 Pac. Rep. 825.

[6] State of Kansas *v.* Pierce, (1893) 52 Kans. 521; s. c., 35 Pac. Rep. 19.

[7] B. G. & M. R. R. Co. *v.* Warren County Court, 10 Bush, 718.

[8] Garrard County Court *v.* McKee, 11 Bush, 236.

of his fee, the judgment of the County Court as to what was beneficial for the county, and the employment of counsel to effect the object cannot be questioned.[1] So have they power to employ counsel to resist the application of a railroad company for a *mandamus* to compel the court to subscribe for its stock and to issue the bonds of the county to pay the subscription; and the County Levy Court should make provision for the payment of a reasonable compensation for the services rendered under such employments.[2] They may appropriate money toward paying the cost of additional buildings erected by a society which supports a portion of the poor children of the county, as the authority given them to purchase land and establish poorhouses is not compulsory and could not constructively abolish the power to provide for the poor in other modes.[3] The power given to employ physicians to inoculate the poor does not empower them to employ a physician for the general treatment of the smallpox.[4] They are authorized to employ medical aid for the relief of poor persons afflicted with smallpox without regard to the color of such persons.[5] The county judge and justices, those constituting the tribunal in charge of county matters in Kentucky, are the judges of the need of a poorhouse, and may purchase land for such purpose and make the necessary improvements.[6]

§ 102. **Power of supervisors in Michigan.**— Unless distinctly authorized by legislation, a board of supervisors cannot incur debts or make engagements, except as the basis of benefit to the county it represents.[7] The power of raising money reposed in boards of supervisors is confined to raising it for none but necessary uses, and all loans negotiated by them must be for some of the purposes mentioned in the statute.[8] They cannot delegate to a committee or third parties such powers as the law requires to be submitted to their own discretion and judgment.[9] They cannot delegate to the county treasurer the auditing of

[1] Ibid.

[2] Washington County Court *v.* Thompson, 13 Bush, 241.

[3] Orphan Society of Lexington *v.* Fayette County, 6 Bush, 415.

[4] Pusey *v.* Meade County Court, 1 Bush, 218.

[5] Rodman *v.* Justices of Larue County, 3 Bush, 145.

[6] Jones *v.* Pendleton County Court, (Ky. 1892) 19 S. W. Rep. 740.

[7] Stamp *v.* Cass County, 47 Mich. 330; s. c., 11 N. W. Rep. 183.

[8] Davis *v.* Board of Supervisors of Ontonagon County, 64 Mich. 404; s. c., 31 N. W. Rep. 405.

[9] Maxwell *v.* Bay City Bridge Co., 41 Mich. 453; s. c., 2 N. W. Rep. 639;

accounts against the county.[1] A resolution of a board of supervisors providing for the raising of money to be paid over to the towns, without any definition of purposes, and to be spent under a town officer's direction, would be invalid, as the board must exercise its own judgment in expending money for roads under its control.[2] There is a presumption that the action of a board of supervisors in voting money for a bridge or for county buildings is lawful.[3] In allowing pay for services as to which the law is silent, a board of supervisors has considerable discretion, which it must exercise if a proper case, in its judgment, arises.[4] Where the determination of a board of supervisors is conclusive not only as to the propriety of making an allowance, but as to the amount, *mandamus* will not lie to control their action.[5] Neither will *mandamus* lie to compel a board of auditors to allow a demand rejected by it on the ground of non-performance of the services charged for.[6]

§ 103. **Power of County Courts in Missouri.**— County Courts in Missouri are the administrative agents of the counties, and can only exercise the powers conferred on them by statute.[7] Their acts within the course prescribed by the statutes are binding upon the county; if beyond, they are not binding.[8] They may make verbal contracts,[9] but cannot bind the counties to all the contracts they may choose to make.[10] If an order of record of a County Court show the subsequent ratification and approval of a contract made by an agent, under a mere verbal appointment, the contract will, notwithstanding the irregularity, be as binding upon the county as if the appointment had been properly

People *v.* St. Clair County Officers, 15 Mich 85.

[1] Vincent *v.* Mecosta County Supervisors, 52 Mich. 340; s. c., 17 N. W. Rep. 938.

[2] Attorney-General *v.* Bay Supervisors, 34 Mich. 46.

[3] Stockle *v.* Silsbee, 41 Mich. 615; s. c., 2 N. W. Rep. 900.

[4] Lee *v.* Board of Supervisors of Ionia County, 68 Mich. 330; s. c., 36 N. W. Rep. 83.

[5] Mixer *v.* Manistee County Supervisors, 26 Mich. 422.

[6] People *v.* Wayne Auditors, 10 Mich. 307.

[7] State *v.* Shortridge, (1874) 56 Mo. 126.

[8] Saline County *v.* Wilson, (1875) 61 Mo. 237; Sturgeon *v.* Hampton, (1885) 88 Mo. 203. County Courts as agents. State ex rel. Quincy, Mo. & Pac. Ry. Co. *v.* Harris, (1888) 96 Mo. 29; s. c., 8 S. W. Rep. 794.

[9] Hase *v.* Warren County, (1877) 3 Mo. App. 567.

[10] Alderson *v.* St. Charles County, (1879) 6 Mo. App. 420.

made in the first instance.[1] Contracts with County Courts must be proved by the record alone, and cannot be varied, contradicted or destroyed by oral evidence of the intention of the judges.[2] Their contracts cannot bind parties with whom they profess to contract by simply reciting the alleged contracts on their records. The assent of the contracting party must appear.[3] They have no implied power to levy a tax. The power must be clearly and expressly given by statute. And if the statute imposes conditions upon which it is to be exercised, those conditions must be observed before the exercise of the power to levy a tax would be lawful.[4] They cannot alter the assessment of taxes to build school houses on the mere ground that a school house was unnecessary,[5] but may compromise disputed claims for taxes.[6] They may contract for insurance upon the county buildings against fire or lightning.[7] They would have no authority to employ counsel at the expense of the county to litigate a question as to whether a scheme of separation had been adopted, the effect of which was to abolish the County Court, but in which the county asserted no claim adverse to that of either party;[8] but may, by an order of record, employ attorneys to aid the prosecuting attorney in any civil business, upon such terms as they may deem proper, if, in the judgment of the courts, the interests of the counties require it.[9] They have no power to issue county certificates of indebtedness;[10] neither is it in their power to discount county warrants in payment of a county debt.[11] They have no authority to issue a a warrant for money expended by the sureties of a defaulting and absconding county treasurer in bringing him back to the county.[12] In case a county treasurer pays a warrant when there is no money in the fund on which it is drawn, he cannot recover

[1] Walker *v.* Linn County, (1880) 72 Mo. 650.

[2] County of Johnson *v.* Wood, (1884) 84 Mo. 489.

[3] Riley *v.* Pettis County, (1888) 96 Mo. 318; s. c., 9 S. W. Rep. 906.

[4] State ex rel. Clinton County *v.* Hannibal & St. Joseph R. R. Co., (1885) 87 Mo. 236.

[5] In re Petition of Powers, (1873) 52 Mo. 218.

[6] St. Louis, Iron Mt. & So. Ry. Co. *v.* Anthony, (1881) 73 Mo. 431.

[7] Walker *v.* Linn County, (1880) 72 Mo. 650.

[8] Henley *v.* Clover, (1878) 6 Mo. App. 181.

[9] Thrasher *v.* Greene County, (1885) 87 Mo. 419.

[10] Smallwood *v.* Lafayette County, (1882) 75 Mo. 450.

[11] Bauer *v.* Franklin County, (1873) 51 Mo. 205.

[12] Hooper *v.* Ely, (1870) 46 Mo. 505.

the amount from the county; and it does not matter that the payment be made at the instance of the County Court, and upon their promise that the amount would be made good, nor that the warrant was received from the treasurer and canceled by the court.[1]

§ 104. Power of county supervisors in New York.— A county cannot be bound by any acts of a board of supervisors, except within the limits of the express power conferred upon them by statute.[2] A county may be bound by a majority of the board of supervisors, lawfully convened, unless it be otherwise expressly provided by law.[3] Such boards having no inherent power to borrow money or to issue negotiable paper, must have statutory authority, express or implied, to do so.[4] Money having been properly raised for a legitimate object, a board of supervisors of a county may change its appropriation, and devote it to another object within the scope of their powers.[5] Under a power given a board of supervisors to provide for a permament location of an armory, by erecting it, they may hire a building for that purpose for a term of years.[6] The execution of its mechanical and physical work may be delegated by a board of supervisors when acting as a mere business corporation in the same manner as by any other corporation.[7] A building committee authorized by a resolution of a board of supervisors "to advertise for sealed proposals," the work "to be let to the lowest responsible bidder, the building committee, together with the architect, to furnish the necessary plans and specifications," would not be authorized to enter into a contract, but simply to take the steps preliminary to the execution of one.[8] A board of supervisors has no authority to contract, in advance, for necessary printing for county officers, but they are bound to audit an account for such printing.[9] And

[1] Cook *v.* Putnam County, (1879) 70 Mo. 668.

[2] Chemung Canal Bank *v.* Supervisors of Chemung, 5 Denio, 517.

[3] People *v.* Brinkerhoff, 68 N. Y. 259.

[4] Parker *v.* Supervisors of Saratoga, 106 N. Y. 392; s. c., 13 N. E. Rep. 308.

[5] People *v.* Baker, 29 Barb. 81.

[6] People ex rel. Stockwell *v.* Earle, (1874) 47 How. Pr. 370.

[7] People *v.* Supervisors of Rensselaer, 52 Hun, 446; s. c., 5 N. Y. Supp. 600.

[8] Ibid.

[9] People *v.* Supervisors of Cortland, 58 Barb. 139; s. c., 40 How. Pr. 53. As to the principle, see People *v.* Supervisors of New York, 21 How. Pr. 288; People *v.* Supervisors of New York, 22 How. Pr. 71.

they cannot bind a county for the payment of the expenses of a litigation by an individual to establish his rights to an office.[1] They have no power to control the disbursements of the poor fund in the hands of the county treasurer.[2] The general power of supervisors of a county to maintain actions includes the power to compromise a doubtful claim on which an action has been brought.[3] Under the power conferred by statute upon the supervisors of a county to provide for the erection of bridges, they may appoint commissioners to carry out the work.[4] A board of supervisors may pass upon and audit a claim for repairs to a county building in case the facts proved raise an inference that the committee of the board ordering the repairs to be made were authorized to do so by the board, and gave directions for the repairs by one of its members.[5] A board of supervisors, where no definite or fixed sum is prescribed as compensation for services rendered for a county, is vested with discretion, and may allow such sum as may seem just.[6] In the statutory power of a board of supervisors to examine, settle and allow all accounts chargeable against a county, is implied the exercise of judgment and discretion, and they have the right and power to reject a claim for sufficient reasons.[7] A board of supervisors, in case they have been induced by misconception of fact to audit and allow a claim against a county, may reconsider and reverse their action in the matter.[8] Supervisors should ascertain whether the county is liable for services rendered at the request of an overseer of the poor who has confessed judgment for the same before they allow the claim against the county.[9] They cannot allow a claim against a county on their own notions as to its being an equitable one.[10]

[1] Supervisors of Richmond County *v.* Ellis, (1875) 59 N. Y. 620.

[2] People *v.* Demarest, 16 Hun, 123.

[3] Supervisors of Orleans County *v.* Bowen, 4 Lans. 24.

[4] People *v.* Meach, 14 Abb. Pr. (N. S.) 429.

[5] Cogan *v.* Mayor, etc., of New York, 5 Hun, 291.

[6] People ex rel. *v.* Supervisors of St. Lawrence County, 30 How. Pr. 173.

[7] People *v.* Supervisors of Dutchess County, 9 Wend. 508; People *v.* Supervisors of Warren County, 1 How. Pr. 116.

[8] People ex rel. *v.* Supervisors of Broome County, 65 N. Y. 222.

[9] Gere *v.* Supervisors of Cayuga County, 7 How. Pr. 255; People *v.* Supervisors of Delaware County, 12 How. Pr. 50.

[10] Chemung Canal Bank *v.* Supervisors of Chemung County, 5 Denio, 517. As to the duty of supervisors in auditing claims against a county, see People ex rel. *v.* Supervisors of St. Lawrence County, 30 How. Pr. 173.

They have no power to indemnify a justice of the peace against the expenses of his defense in impeachment.[1]

§ 105. Power of county commissioners in Pennsylvania.—A county is not bound by a contract made by one county commissioner.[2] But two of the commissioners may bind the county by a contract made in their official capacity, though not at their office.[3] County commissioners in Pennsylvania have power to purchase everything necessary for the accommodation of persons employed in conducting a general election.[4] But they cannot bind a county by a prior agreement to pay costs on a *nolle prosequi* with leave of court.[5] To bind a county by an informal agreement made by two of its commissioners within the scope of their powers, such agreement must be expressly or impliedly ratified and confirmed by its commissioners acting as a board.[6] They may also bind a county by a contract for the removal of an insane prisoner to a hospital and his maintenance therein.[7] County commissioners can only contract with counsel to represent the county in litigation for a reasonable compensation.[8]

§ 106. Power of county boards in Wisconsin.—A county board may bind the county by contracts as to matters within their control, but not as to matters intrusted to a particular officer.[9] A county board may, by resolution, confer upon a committee of its number the power to purchase a poor farm.[10] And the county will be bound by the action of such committee in making a purchase of a poor farm and accepting the deed and liable for the price of the same without any further action of the county board ratifying the purchase.[11]

§ 107. Power of township trustees in Indiana.—Township trustees may levy a tax to build school houses.[12] And a contract

[1] People *v.* Lawrence, 6 Hill, 244.
[2] Treichler *v.* Berks County, 2 Grant's Cas. (Pa.) 445.
[3] Jefferson County *v.* Slagle, 66 Pa. St. 202.
[4] Commonwealth *v.* Commissioners of Philadelphia, 2 Serg. & R. 193.
[5] Berks County *v.* Pile, 18 Pa. St. 493.
[6] Township *v.* County, 2 Woodward's Dec. (Pa.) 194.
[7] Allegheny County *v.* Western Pennsylvania Hospital, 48 Pa. St. 123.
[8] County *v.* Barber, 97 Pa. St. 455.
[9] Beal *v.* St. Croix County, 13 Wis. 500.
[10] French *v.* Dunn County, 58 Wis. 402.
[11] Ibid.
[12] Adamson *v.* Auditor, 9 Ind. 175.

of township trustees for building such houses is binding on the township.[1] An order of a board of trustees of a township signed by the clerk and president of the board, requiring the treasurer to pay a fixed sum for building a school house, was in this case held to be a valid demand against the township.[2] A township trustee has no authority to borrow money or to execute notes in the name of the school township.[3] The trustee of the school township in this case borrowed money from a bank and executed notes of the corporation for the loan. He deposited the money in the bank in his own name and drew upon it as an individual. The Supreme Court of Indiana held that this was a transaction between him and the bank, and that the township was not liable upon the note.[4] On the petition for a rehearing of this case the court adhered to the opinion that the trustee of a school corporation was a special agent of very limited authority; that not only was he a special agent, but that he was one whose authority was only such as the public statute conferred upon him.[5]

[1] Crist *v.* Brownsville Township, 10 Ind. 461.

[2] Heal *v.* Jefferson Township of Grant County, (1860) 15 Ind. 431.

[3] Union School Township *v.* First National Bank of Crawfordsville, (1885) 102 Ind. 464; Bicknell *v.* Widner School Township, 73 Ind. 501; Wallis *v.* Johnson School Township, 75 Ind. 368; First National Bank *v.* Union School Township, 75 Ind. 361; Pine Civil Township *v.* Huber Manufacturing Co., 83 Ind. 121; Reeve School Township *v.* Dodson, 98 Ind. 497.

[4] Union School Township *v.* First Nat. Bank of Crawfordsville, (1885) 102 Ind. 464. It was said: "The trustee, in the management of the financial affairs of the school township, is a special agent with limited statutory powers. He has no general authority to bind the corporation. His acts create a binding obligation against the school township only when he does the acts which the law authorizes, and does them in the manner which it prescribes. All who deal with him are bound to take notice of the scope of his authority * * *." The court said in Axt *v.* Jackson School Township, 90 Ind. 101: "In dealing with such trustee the appellant was bound to take notice of his fiduciary character, and to know that he could only bind his township by his words and deeds which were authorized by law." It was not in [this trustee's] power, by checks, notes or other instruments, to bind the school corporation unless the claim for which they were given existed against the township, and in this case no claim did exist. Even if the trustee had been guilty of fraud the school corporation would not have been bound. Lowell Five Cents Savings Bank *v.* Inhabitants of Winchester, 8 Allen, 109; Benoit *v.* Inhabitants of Conway, 10 Allen, 528; Dickinson *v.* Inhabitants of Conway, 12 Allen, 487; Kelley *v.* Lindsey, 7 Gray, 287; Railroad Nat. Bank *v.* City of Lowell, 109 Mass. 214.

[5] Union School Township *v.* First National Bank of Crawfordsville, (1885) 102 Ind. 464, 473. ELLIOTT, J., speaking for the court, said: "That

§ 108. Power of selectmen of towns in Massachusetts.—A town cannot be bound by an unauthorized oral promise of its selectmen to pay bounty to a soldier.[1] Where the inhabitants of a town have by vote authorized their treasurer to borrow money for the adjustment of a state tax for the reimbursement of bounties to volunteers, and the tax had been adjusted without the necessity of borrowing money, it was held that the treasurer's authority to borrow money under that vote of the inhabitants ceased upon the adjustment of the tax.[2] Selectmen have no authority, merely *virtute officii*, to make a contract on behalf of a town for the hiring of a building in which town meetings may be held.[3] Selectmen of a town have no authority to bind the town by an offer of a reward for the apprehension and conviction of a person who has not been charged with a crime by complaint or indictment.[4]

§ 109. Power of selectmen of towns in New Hampshire.—Selectmen of towns have no general authority to bind the town by contract.[5] They cannot borrow money upon the credit of the town.[6] Being general agents for towns in respect to pecuniary matters, unless restrained by specific instructions, they are warranted in paying any existing debts of towns which, in the exercise of a sound discretion on their part, should be paid.[7] They

this conclusion is a just one cannot be doubted by one who considers the nature of a school corporation and the character of the authority of its agent, the trustee. The corporation is itself organized for a limited and local purpose. It is not a corporation with general powers; it has neither the general power to contract debts nor to buy property. Its power is to conduct the local school affairs, and to do this with the money derived from the revenues set apart for school purposes. There is, in strictness, no power in the corporation to obtain or to expend money derived from any other source than the school revenues. Wallis *v.* Johnson School Township, 75 Ind. 368. Thus is the power of the corporation itself circumscribed, and its agent, the trustee, can by no possibility possess authority that is not possessed by his principal. It is perfectly obvious, therefore, that one who deals with a school trustee must, at his peril, ascertain that the trustee is acting within his authority. It is incumbent upon a person seeking to hold the corporation liable for a debt created by the trustee in the name of the corporation, to affirmatively show that it was one he had authority to confer."

[1] Barker *v.* Chesterfield, (1869) 102 Mass. 127.

[2] Benoit *v.* Inhabitants of Conway, (1865), 10 Allen, 528.

[3] Goff *v.* Rehoboth, (1846) 12 Met. 26.

[4] Day *v.* Otis, 8 Allen, 477.

[5] Andover *v.* Grafton, 7 N. H. 298.

[6] Rich *v.* Errol, 51 N. H. 350.

[7] Sanborn *v.* Deerfield, 2 N. H. 251

may, in some cases, bind the town by a promissory note, but the holder must show that in giving the note the selectmen acted within the scope of their authority.[1] They may institute a suit in the name of a town to recover back usurious interest.[2] Negotiable notes, the property of a town, may be sold and transferred by selectmen.[3] Adjustment of suits or controversies of a town, not being in their power, as selectmen, they cannot bind the town to the payment of money for such an adjustment by a written contract.[4] A town may be bound by its selectmen for medical services in vaccinating, but not for medical services rendered persons sick with smallpox, who are not paupers. The health officers of a town have no authority to bind the town for medicines and medical services furnished to inhabitants who are not paupers.[5]

§ 110. Power of supervisors of townships in Pennsylvania.— A township cannot be bound by one of its supervisors in a matter requiring deliberation, consultation and judgment. Such a matter must be determined by a majority of the board at a regular meeting.[6] Nor can it be bound by a contract made by one supervisor, without the assent of his colleague, with an attorney for a year at a fixed sum.[7] A township may be bound by a mere ministerial act of a single supervisor, such as the employment of hands and giving due bills for the amount of work done on its roads.[8] In a matter where the township is bound by law to perform the contract made by a single supervisor, it is in the power of this single supervisor to contract if the other refuse his assent.[9] A supervisor has no authority to bind a township by his agreement to pay a bounty for enlistment in United States service.[10]

[1] Andover *v.* Grafton, 7 N. H. 298.

[2] Albany *v.* Abbott, 61 N. H. 157.

[3] West *v.* Errol, 58 N. H. 233.

[4] Underhill *v.* Gibson, 2 N. H. 352.

[5] Wilkinson *v.* Albany, 28 N. H. 9; Farmington *v.* Jones, 36 N. H. 271; McIntire *v.* Pembroke, 53 N. H. 462.

[6] Township *v.* Gibboney, 94 Pa. St. 534. As to liability of a township for a contract made by its supervisors within the apparent scope of their authority, see Cook *v.* Deerfield, 64 Pa. St. 445.

[7] Bohan *v.* Township, 4 Kulp, (Pa.) 234.

[8] Dull *v.* Ridgway, 9 Pa. St. 272; McNeal *v.* Allegheny Township, 1 Am. Law Reg. 124.

[9] Pottsville *v.* Norwegian Township, 14 Pa. St. 543. As to contracts that cannot be made by a single supervisor which will bind the township, see Cooper *v.* Lampeter Township, 8 Watts, 125; McNeal *v.* Allegheny Township, 1 Am. Law Reg. 124; Batten *v.* Brandywine, 3 Clark, (Pa.) 462.

[10] Bearce *v.* Township, 27 W. N. C. (Pa.) 212.

Supervisors of a township may borrow money for the purpose of repairing roads and building bridges, and confess judgment against the township for the amount borrowed.[1] Supervisors of townships have power to contract for making new roads ordered to be opened and building the necessary bridges.[2] It is within the general powers of the supervisors of a township to contract for the erection of a township bridge in place of one destroyed by a freshet.[3] They may bind the township by a promise to repay voluntary subscriptions to a bounty fund.[4] And in case supervisors agree to a division of the charge of the affairs of the township, by apportioning to each a certain part of the district, the acts of each, within the limits assigned to him, will be binding on the township.[5] Supervisors have no right to take up an old certificate of indebtedness issued by the township and issue a new one to the assignee of the original payee.[6]

§ 111. **Power of selectmen and agents of towns in Vermont.**—A town cannot be bound by a contract made by one selectman, without the knowledge or consent of the others.[7] In case it be shown that the three selectmen of a town agreed together as to the mode in which the business of the town should be transacted and the business was intrusted by two of them to the third one, and he made the contracts with reference to the business of the town, a jury would be justified in finding such assent on the part of the others, or any of them, as to make the act of the one contracting the act of the majority and binding upon the town.[8] Selectmen of a town have no right to receive money collected by a sheriff on an execution in favor of a town and discharge him, it being the duty of the sheriff to pay it to the town treasurer.[9] Selectmen have no authority to draw town

[1] Maneval *v.* Township, 9 Pa. Co. Ct. Rep. 28.

[2] Childs *v.* Brown Township, 40 Pa. St. 332.

[3] Oakland Township *v.* Martin, 104 Pa. St. 303.

[4] Juniata Township *v.* Reamer, 2 W. N. C. (Pa.) 91.

[5] Commonwealth *v.* Supervisors of Colley, 29 Pa. St. 121; Hopewell *v.* Putt, 2 W. N. C. (Pa.) 46. In Sheppard *v.* Township, 4 Del. Co. Rep. (Pa.) 385, where the supervisors had divided their district, the township was held liable for stone purchased by one of the supervisors for the use of the township, and the other supervisors had not dissented from the purchase.

[6] Snyder Township *v.* Bovaird, 122 Pa. St. 442; s. c., 15 Atl. Rep. 910.

[7] Hunkins *v.* Johnson, 45 Vt. 131.

[8] Guyette *v.* Bolton, 46 Vt. 228.

[9] Middlebury *v.* Rood, 7 Vt. 125.

orders in their own behalf in settlement of their own private claims against the town; nor are such orders made effectual by the allowance of the town auditors.[1] Selectmen of a town may submit to arbitration a claim against the town, for instance, for building a bridge, under the statutory powers given them "to audit, and in their discretion to allow, the claim of any person against the town for money paid or services performed for the town."[2] So they may submit to arbitration claims against their towns for damages sustained upon the highways of the towns.[3] The selectmen of a town have the power to settle and stop a suit against a party brought to recover a penalty for not removing an obstruction out of the highway under an order of the selectmen.[4] And the general authority of the selectmen over the subject would not be limited by a vote of the town "to direct the town agent to manage the law suits as he thinks best."[5] A town having appointed an agent for the purpose of "compromising" a claim for damages in the laying of a highway, the agent may refer the claim to arbitration.[6] A town agent, appointed to defend and prosecute suits, has no authority as such to bind the town by a promise to pay a certain sum on settlement of a suit against the town to recover for an injury occasioned by insufficiency of a highway.[7] A town would be bound for professional services of the town agent, who is an attorney, where he is authorized as town agent to employ an attorney to prosecute and defend

[1] Davenport *v.* Johnson, 49 Vt. 403. In Burnham *v.* Strafford, 53 Vt. 610, an action of assumpsit brought by a selectman against the town, the evidence tended to prove that he borrowed for the town a sum of money and gave a town order for the same, to which he attached his own name and the names of the other two selectmen, and paid the money into the town treasury; that the town denied his authority to give the order and refused to pay it, and denied that he had paid the money into the treasury, or that the town ever received any part of it; and upon this refusal and denial on the part of the town, the selectmen took up the order by paying the holder the amount for which it called. The Supreme Court held that, although he could not recover for the amount paid to take up the order as for money paid at the town's request, the town having repudiated the order, nor upon the order itself, it not being negotiable, yet, if in fact he paid into the treasury the sum originally borrowed and he had himself repaid the loan, he could recover in this action.

[2] Dix *v.* Dummerston, 19 Vt. 262.

[3] Hollister *v.* Pawlet, 43 Vt. 425.

[4] Town of Cabot *v.* Britt, (1863) 36 Vt. 349.

[5] Ibid.

[6] Schoff *v.* Bloomfield, 8 Vt. 472.

[7] Clay *v.* Wright, 44 Vt. 538.

suits on behalf of the town.[1] In road cases, where the town agent provides no counsel and makes no objection to the employment of counsel by the selectmen of a town, it is within the scope of the implied powers of the selectmen to protect the interests of their town by the employment of counsel at the charge of the town in such cases.[2] And the assent of the town agent to such employment of counsel by the selectmen may be presumed where he neglects to employ counsel and no dissent on his part is shown.[3]

§ 112. **Power of town officers in Wisconsin.**—The officers of a town when transcending their lawful authority cannot bind the town.[4] A town may be bound by a contract which it is authorized to make by the joint act of two supervisors.[5] A town board of supervisors is not authorized to compromise and discharge an existing valid judgment in favor of the town, without full payment in money or its equivalent.[6] A town board may, without special authority from the electors, defend a suit against the town, or take an appeal therein.[7] The chairman of a town board may be directed by such board to execute a subscription or bond authorized to be issued by the town, and the act of the chairman will be essentially the act of the board.[8]

§ 113. **Power of officers of school districts.**—School districts can be bound by their directors by their official acts, and of these acts the minutes of the board are the best evidence.[9] They cannot, by contract, divest themselves of powers conferred for a public purpose.[10] School directors have an absolute discretion as to the necessity of erecting new school houses and of borrowing money to pay for them.[11] Where a committee has been appointed by a school board to get up plans for a new school building and submit them to the board for approval, the committee would be authorized to contract with an architect for plans and specifica-

[1] Langdon *v.* Castleton, 30 Vt. 285.

[2] Burton *v.* Norwich, 34 Vt. 345.

[3] Ibid.

[4] Hubbard v. Lyndon, 28 Wis. 674.

[5] Beaver Dam v. Frings, 17 Wis. 398.

[6] Butternut v. O'Malley, 50 Wis. 329.

[7] Haner v. Town of Polk, 6 Wis. 350.

[8] Hewitt v. Town of Grand Chute, 7 Wis. 282.

[9] Wachob *v.* Bingham School District, 8 Phil. 568.

[10] Conley *v.* Directors of West Deer, 32 Pa. St. 194.

[11] In re School Directors, 3 Kulp, (Pa.), 104; In re School Directors, 2 Pa. Co. Ct. Rep. 497.

tions.[1] Contracts with a school teacher cannot be made except by a vote of the school board; one made by the president and secretary of the board cannot be enforced.[2] As incidents to their power to sell, directors of school districts have power to mortgage the real estate held by them.[3] Where school officers are authorized to make contracts only with the assent of a majority of the electors, a contract made by them without such assent would be void.[4] The officers of a school district may make a valid contract with a qualified teacher extending beyond their own term.[5] A valid contract with one of their number for the purchase of a site for a school house in exchange for bonds may be made by commissioners to receive and negotiate bonds and purchase school sites, the vendor not acting in the transaction as a commissioner.[6] A school district may avoid a contract between a school board and one of the members of the board for the erection of a school house by the latter.[7] Directors of a school district voting for a misapplication of the public funds are personally liable therefor to the township.[8] Where it was found that a school board had conspired with a contractor to defraud the district in the erection of a school building, it has been held in Iowa that under the statute authorizing such boards to employ counsel in suits brought against any of the school officers to enforce the provisions of the school law, they had no power to employ counsel in a suit to enjoin them from accepting and paying for the school building.[9] A *de facto* trustee of a school district may bind the district by his contract with a teacher for the schools.[10] The officers of school districts are limited to the purposes named in the statute prescribing their powers in the matter of raising or expending funds of the school district. In an action against members of a school board of education, for instance, for damages to the business reputation of parties by

[1] McKeesport District *v.* Miller, 1 Pennypacker (Pa.), 510.

[2] School District *v.* Padden, 89 Pa. St. 395.

[3] Morrisville School District, 3 Phil. 181.

[4] Peck *v.* School District, 21 Wis. 516.

[5] Webster *v.* School District, 16 Wis. 316.

[6] Cady *v.* Watertown, 18 Wis. 322.

[7] Pickett *v.* School District, 25 Wis. 551.

[8] Dickinson Township *v.* Linn, 36 Pa. St. 431.

[9] Scott *v.* Independent District of Hardin County, (Iowa, 1894) 59 N. W. Rep. 15.

[10] O'Neil *v.* Battie, (1892) 62 Hun, 618; s. c., 18 N. Y. Supp. 255. See, also, O'Neil *v.* Battie, 61 Hun, 622; s. c., 15 N. Y. Supp. 818.

reason of a refusal on their part to entertain a bid of such parties for furnishing supplies for the schools on the ground that such parties had before dealt dishonestly with the district, the school board would not be authorized to expend the moneys of the district in defending the suit, it being such a matter as the district itself has no interest in.[1] A member of a district school board having no school funds in his hands, not being its treasurer, it has been held in New Hampshire could not recover of the district the money he had paid to a teacher hired by himself to teach one of the schools and for board he had furnished the teacher on the ground that he could contract only on the credit of the school money of the district and not on the credit of the district itself.[2] Directors of a school district in Iowa have power to borrow money to discharge a debt which has been legitimately created, and may pledge the credit of the district for that purpose. But the obligation evidencing the debt can only bear six per cent interest.[3] The district board of primary school districts in Michigan may contract with qualified teachers for such term as shall be determined by the qualified voters of the district at the annual school meeting thereafter to be held.[4] The presumption that a contract with a teacher was authorized by a vote of the school board pursuant to the statute of Wisconsin upon the subject will be raised by the fact that the officers constituting the board signed it. And the mere fact that the officers were not together when they signed it would not tend to disprove that it was so authorized.[5]

[1] Hotchkiss *v.* Plunkett, (1891) 60 Conn. 230; s. c., 22 Atl. Rep. 535.

[2] Wheeler *v.* Alton, (N. H. 1892) 23 Atl. Rep. 89.

[3] Austin *v* District Township of Colony, (1879) 51 Iowa, 102; s. c., 49 N. W. Rep. 1051.

[4] Cleveland *v.* Amy, (1891) 88 Mich. 374; s. c., 50 N. W. Rep. 293.

[5] Dolan *v.* Joint School District No. 13, Towns of Utica & Freeman, (1891) 80 Wis. 155; s. c., 49 N. W. Rep. 960.

CHAPTER IV.

POWER OF AGENTS AND OFFICERS — PRIVATE CORPORATIONS.

§ 114. **Agency in general.**—A corporation can only act through a duly authorized agent or committee.[1] Authority may be conferred by a single resolution of the directors for action in a class of cases as well as by a separate resolution in each case.[2] Though a corporation must, in general, act through its common seal, yet it may appoint an agent whose acts, within the sphere of his powers, do not require any such appendage to impart to his acts validity.[3] The powers of an agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise within the limits of the charter. The silent acquiescence of the directors or managers may be as effectual to clothe the agent with power as an express letter of attorney.[4] A corporation will be bound by a promissory note executed by its agent should he act within the sphere of his power or his act be subsequently ratified.[5] An agent of a corporation acting within the scope of his authority may bind his principal in the same way

[1] Merchants' Union Barb Wire Co. *v.* Rice, (1886) 70 Iowa, 14; s. c., 28 N. W. Rep. 494.

[2] Elwell *v.* Dodge, 33 Barb. 336.

[3] Everett *v.* United States, (1837) 6 Port. (Ala.) 166; citing Bank of Columbia *v.* Patterson, 7 Cranch, 299; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; Fleckner *v.* United States Bank, 8 Wheat. 339, 358.

[4] Olcott *v.* Tioga R. R. Co., 27 N. Y. 546.

[5] Butts *v.* Cuthbertson, 6 Ga. 166.

as if he were the agent of a natural person unless the charter expressly provides otherwise.[1] Should an agent of a corporation having authority to execute a mortgage and affixes to one he executes anything which the law recognizes as a seal when affixed by a natural person, it will be presumptively a good execution by the corporation.[2] A contract in writing may be binding on a corporation though a private seal of one its officers be used instead of the corporate seal, and though no record may be found authorizing the officer to make the contract if proven by other evidence that he had such authority or that the corporation ratified his act afterwards.[3] The authority of an agent to bind a corporation by a contract for borrowing money may be inferred from proof of the character of the agency, the acts of the agent and the knowledge of the officers and directors of his habit to make similar contracts and their acquiescence in the same and the fact of the money being applied to the use of the corporation.[4] Whatever the purpose of the agency, an agent of a corporation may be appointed without the use of a seal.[5] The appointment of an agent by a corporation may be inferred from the permission, or acceptance, of his services.[6] If one has long acted in the capacity of managing director of a corporation without objection, and his services as such have been invariably accepted, it matters not, as against strangers, whether or not he has received a specific appointment to such position from the directors.[7] It is not necessary that the authority be given by a formal vote in matters where the acts of the agent of a corporation in the transfer of personal property require no formal instrument under seal, as in the sale or mortgage of personal

[1] City of Covington *v.* Covington & Cincinnati Bridge Co., (1873) 10 Bush (Ky.), 69.

[2] Johnston *v.* Crawley, 25 Ga. 316.

[3] Eureka Company *v.* Bailey Company, (1870) 11 Wall. 488.

[4] Allen *v.* Citizens' Steam Navigation Co, 22 Cal. 28. In Savings Bank of New Haven *v.* Davis, 8 Conn. 201, it appeared that the directors of a corporation, by the charter, had the power of disposing of its property and of appointing such agents as should be requisite for performing its business, and that, by a vote entered upon their record book, they appointed an agent to execute a mortgage deed of real estate to secure a creditor. The appointment of the agent, though not otherwise evidenced or authenticated by the corporate seal, was held valid for the purpose intended. See, also, Beckwith *v.* Windsor Manufacturing Co., 14 Conn. 603.

[5] Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34; s. c., 12 Atl. Rep. 732.

[6] Burgess *v.* Pue, 2 Gill (Md.), 254.

[7] Walker *v.* Detroit Transit R. Co., 47 Mich. 338; s. c., 11 N. W. Rep. 187.

property.[1] The authority of an agent of a private corporation to bind it by a contract for borrowing money may be shown without proof of a resolution of the managing board directly conferring the authority or of any formal ratification of the contract by such board. His authority may be inferred from proof of the character of the agency, of the acts of the agent or other knowledge of the officers and directors of such habit to make such contracts and their acquiescence in the same and the fact of the money being applied to the use of the corporation.[2] The authority to an agent of a corporation to contract in its behalf, either under seal or otherwise, need not be conferred at a meeting of the directors unless that is the usual mode of their doing such an act. Should the board adopt the practice of giving assent to the execution of contracts by their agents, assent so given is of the same force as if done at a regular meeting of the board.[3] Where an act of incorporation does not require that the appointment of an agent of the corporation shall be by written instrument, and it does not appear to have been so made, the appointment may be proved by parol.[4] It is not necessary to enter on the minutes of a corporation a vote or resolution of the directors appointing an agent. His appointment may be inferred from the permission or acceptance of his services by the corporation.[5] The appointment as well as the authority of an agent of a corporation may be implied from the adoption or recognition

[1] Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34; s. c., 12 Atl. Rep. 732. As to formally authorizing the acts of officers being or not being necessary, see Calvert *v.* Idaho Stage Co., (1894) 25 Or. 412; s. c., 36 Pac. Rep. 24; Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. Rep. 286; s. c., 7 C. C. A. 225; Burch *v.* Paper Co., 141 Ill. 519; s. c., 31 N. E. Rep. 420.

[2] Allen *v.* Citizens' Steam Navigation Company, (1863) 22 Cal. 28.

[3] Bank of Middlebury *v.* Rutland & Washington R. R. Co., 30 Vt. 159; Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144; State ex rel. Page *v.* Smith, 48 Vt. 266. As to appointment of agents of corporations by parol, see Jhons *v.* People, 25 Mich. 499; Taymouth *v.* Koehler, 35 Mich. 22. As to proving by parol evidence their official capacity, see Cahill *v.* Kal. Mut. Ins. Co., 2 Douglass (Mich.), 124; Druse *v.* Wheeler, 22 Mich. 439.

[4] Hamilton *v.* New Castle & Danville R. R. Co., (1857) 9 Ind. 359; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146; Madison *v.* Ross, 3 Ind. 236 Cincinnati, etc., Co. *v.* Clarkson, 7 Ind. 595; Jones *v.* Milton, etc., Co., 7 Ind. 547.

[5] Burgess *v.* Pue, 2 Gill (Md.), 254; Warren *v.* Ocean Insurance Co., 16 Me. 439; Jones, Admr., etc., *v.* Trustees Florence Wesleyan University, 46 Ala. 626; State Bank *v.* Comegys, 12 Ala. 772.

of his acts by the corporation.[1] So, also, from the course of dealing and from contemporaneous and subsequent acts on the part of the corporation.[2] An agent of a corporation will not be personally liable upon a contract in his own name under seal with another person where, in the body of the contract, it is stated that the agent contracted in behalf of the body corporate.[3]

§ 115. **Rules as to an agent's acts.**— The power of an agent of a corporation, unless otherwise shown, will be limited to the business of the corporation, connected with or relating to the object and design of the charter of the corporation.[4] And he can only make such contracts as the corporation can lawfully make.[5] If the acts of an agent of a corporation are some within, and some beyond, the corporate powers, the corporation may ratify his acts so far as they were within its powers.[6] Agents of a corporation are not required, by any rule of the common law, to act by deed in behalf of their principals, where they might act themselves by parol.[7] Though not reduced to writing, their contracts bind a corporation.[8] Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all the duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie.[9] The acts of agents of corporations, within the ordinary line of their duty, bind corporations without any formal vote.[10] The name of the corporation as

[1] Kiley *v.* Forsee, (1875) 57 Mo. 390; Southgate *v.* Atlantic & Pacific R. R. Co., (1875) 61 Mo. 89. As to implying an agency for a corporation from facts and circumstances, see Northern Central Ry. Co. *v.* Bastian, 15 Md. 494.

[2] Washington Mut. Fire Ins. Co. *v.* St. Mary's Seminary, (1873) 52 Mo. 480.

[3] McDonough *v.* Templeman, 1 H. & J. (Md.) 156.

[4] Pennsylvania, Del. & Maryland Steam Navigation Co. *v.* Dandridge, 8 G. & J. (Md.) 248.

[5] Downing *v.* Mount Washington Road Co., 40 N. H. 230.

[6] Bangor Boom Corporation *v.* Whiting, (1848) 29 Me. 123.

[7] Buncombe Turnpike Co. *v.* McCarson, 1 Dev. & Bat. (N. C.) 306.

[8] City Bank of Baltimore *v.* Bateman, 7 H. & J. (Md.) 104; Union Bank *v.* Ridgely, 1 H. & G. (Md.) 326.

[9] Bank of Columbia *v.* Patterson, 7 Cranch, 299, 306; Eastman *v.* Coos Bank, 1 N. H. 23; Smith *v.* Nashua & Lowell Railroad, 27 N. H. 86; Glidden *v.* Unity, 33 N. H. 571; Great Falls Bank *v.* Farmington, 41 N. H. 33; Andover *v.* Kendrick, 42 N. H. 324.

[10] Foot *v.* Rutland & Whitehall R. R. Co., 32 Vt. 633. As to acts of

the contracting party should be in the body of the contract, where an agent would bind the corporation only in making a contract in its behalf, and the agent should sign it as agent or officer.[1] A committee appointed by a corporation, having made a settlement of matters between the corporation and third parties, and it appearing that the corporation had received the check of the third party from its committee, it has been held was sufficient to justify the trial court in submitting the question of ratification of the committee's action by the corporation to the jury.[2] An attorney at law representing a corporation in a suit in the courts, must have special authority to compromise the same. But, in case he makes such a compromise, the facts of which may be known to the officers of the corporation intrusted with its affairs, and they frequently advise with the attorney about the matter, and make no objection to it, and the corporation accept the benefit of the compromise, as by receiving the money agreed to be paid it, this would amount to a ratification of the attorney's acts.[3] Authority to give a negotiable promissory note for the amount advanced is not included in an authority to advance money for a corporation.[4] A corporation will not be bound by the acts or knowledge of one of its officers in a matter in which he acts for himself and deals with the corporation as if he had no official relations with it.[5]

§ 116. To what the powers conferred on agents may be extended.— The authority to give to the lender of money bor-

agents of corporations being done in the line of such agency in order to bind the corporations, see Queen *v.* Second Ave. R. R. Co., (1872) 35 N. Y. Super. Ct. 154. There can arise no presumption that an agent has authority to transact business, which the corporation is not authorized by its charter to engage in. Alexander *v.* Cauldwell, (1881) 83 N.Y. 480. As to corporations being bound by the acts of their agents made in the ordinary discharge of their duty, though not authorized, or executed, under corporate seal, see Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Fanning *v.* Gregoire, 16 How. 524; Bank of Metropolis *v.* Guttschlick, 14 Pet. 19; Bank of U. S. *v.* Dandridge, 12 Wheat. 67; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Fleckner *v.* U. S. Bank, 8 Wheat. 339.

[1] Hamilton *v.* New Castle & Danville R. R. Co., (1857) 9 Ind. 359; Hankins *v.* Shoup, 2 Ind. 342.

[2] Merchants' Union Barb Wire Co. *v.* Rice, (1886) 70 Iowa, 14; s. c., 28 N. W. Rep. 494.

[3] Wetherbee *v.* Fitch, (1886) 117 Ill. 67; s. c., 7 N. E. Rep. 513.

[4] Webber *v.* Williams College, (1839) 23 Pick. 302.

[5] Platt *v.* Birmingham Axle Co., (1874) 41 Conn. 255.

rowed, or to the seller of things purchased, the ordinary securities of a corporation is included in a general power conferred upon an agent of a railroad corporation to borrow money on its behalf, in such sums, for such length of time and at such a rate of interest as he may think proper, and to purchase iron rails, locomotives, machinery, etc., as he may deem advisable, and, in order to do so, to make, execute and deliver obligations, bills of exchange, contracts and agreements of the corporation.[1] And the authority from a corporation to an agent to give a company "note" has been held to authorize drawing a bill of exchange on a person who had no funds, and where the company would not by law be chargeable with damages on dishonor.[2] While a factor employed by the general agent of a corporation to sell its manufactured goods and to purchase stock has power to buy on credit, he is not authorized to give the note of the corporation for the purchases he makes on its account.[3] An agent of a manufacturing corporation was empowered by its by-laws to manage the affairs of the corporation committed to his care, and to exercise the powers committed to him according to his best ability and discretion, and promptly to collect all assessments and other sums that should become due to the corporation, and to disburse them according to the order of the board of directors, who were made a board of control over him. The Supreme Court of Judicature of Massachusetts held that the agent, the board of directors not interposing to control his proceedings, had authority to employ workmen to carry on the business of the corporation, and to pay them with its funds, or, not being in funds, to give the notes of the corporation in payment.[4] An agent of an incorporated manufacturing company, authorized by its by-laws to raise money and create liability on its part, may also waive demand and notice on a note indorsed by such company, and this, too, after the note has been negotiated. He may waive demand and notice to procure delay of payment of the note and bind the corporation, although, in procuring delay, he may also be the agent of the maker. And the fact that he agreed to pay more than the legal rate of interest for such delay would prevent a recovery against

[1] Hatch v. Coddington, (1877) 95 U. S. 48.

[2] Tripp v. Swanzey Paper Co., (1832) 13 Pick. 291.

[3] Emerson v. Providence Hat Manufacturing Co., (1815) 12 Mass. 237.

[4] Bates v. Keith Iron Co., (1843) 7 Met. 224.

the company, upon their indorsement, of the amount legally due.[1]

§ 117. Illustration of the binding force of an agent's acts.— In a New York case it appeared that the president of a Pennsylvania corporation, a coal company, was, during all the time of the transactions involved in the action, the actual manager of the business of the corporation, and, with the nominal treasurer of the corporation, owned all its stock, except a few shares held by persons employed in the office of the company, sufficient to qualify them for directors, and thus to make and maintain a corporate organization. As president, he drew the drafts and indorsed the checks and other commercial paper of the company, and directed all the financial affairs of the corporation with the knowledge of the other directors and stockholders. The company's business, the sale of coal mined by them, for cash and on credit, at wholesale and retail, was quite large in one of the cities of New York. The president of the coal company addressed a letter to the president of a bank it that city informing him that a certain person was "the authorized agent of the [corporation] for the sale of its coal at [that city]," and then added: "Any paper he may take for coal sold for said company he is authorized to indorse as the agent of said company, and get it discounted at your [the Marine] bank, and that any and all such paper so indorsed which you may discount for him the said company will see paid.

"[Signed by] [his name], *President*."

This was an action by the bank against the company on its indorsement of a number of these notes discounted by it, which were not paid by the makers, and for an overdraft made by this agent. The Supreme Court of New York, in General Term, sustained the conclusion of a referee in the suit awarding a recovery to the bank.[2]

[1] Whitney *v.* South Paris Manufacturing Co., (1855) 39 Me. 316.

[2] Marine Bank of Buffalo *v.* Butler Colliery Co., (1889) 52 Hun, 612; s. c., 5 N. Y. Supp. 291. *Arguendo*, it was said: "The notes were evidently discounted by the [bank], relying upon the apparent authority of Hubbell, the agent, to indorse them for the defendant. The letter [above quoted] gave the [bank] notice of [his] authority as agent of the defendant to sell its coal at Buffalo, to take notes for coal sold, to indorse such notes for the defendant and to procure their discount at the [bank]. The authority of [the writer] to write the letter and to bind the defendant

§ 118. **Power of general agents.**— A general agent of a corporation has power to direct and control its general business, to make contracts which will bind the corporation in the ordinary course of its business, and to borrow money for such purpose on

thereby is clearly established by the undisputed evidence of the manner in which the business of the corporation was conducted. During all the years covered by the transactions in question the president of the corporation was permitted to be, and to hold himself out to the world as being, the general manager and director of its business. The act in question was within the scope of the authority thus practically accorded to him, and the defendant cannot set up its by-laws, never published to the world and habitually disregarded by itself, as countervailing the authority thus publicly conferred. Martin *v.* Niagara Falls Paper Manufacturing Co., (1887) 44 Hun, 130, 138; Martin *v.* Webb, 110 U. S. 7; s. c., 3 Sup. Ct. Rep. 428. That the notes were within the terms of the letter has been found by the referee on undisputed evidence. They were given for coal sold by the agent for the defendant. That some of them were taken in renewal of notes given when the coal was sold, does not change the character of the indebtedness, nor of the evidence of it. Moreover, the [bank] had a right to rely on the representations of the agent, not of the existence of his authority to procure discounts, but that the notes offered by him for discount were within the scope of that authority, and the [corporation] is estopped to deny that those representations were true. Bank of Batavia *v.* New York, L. E. & W. Railroad Co., 106 N. Y. 195; s. c., 12 N. E. Rep. 433. In that case the court says: 'It is a settled doctrine of the law of agency in this state that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person, dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.' In this case the extrinsic fact that the notes were given for coal, upon which the authority of the agent depended, and which were solely within his knowledge, was represented not only by the presentation of the notes for discount, but by the repeated assurances of the agent that he never did and never should present notes of any other character. The fact that the indorsements were made in the name of E. S. Hubbell, agent of the Butler Colliery Company, and not in the name of the corporation by E. S. Hubbell, agent, though not strictly confined to the language of the authority, was within its spirit and intent, and was ratified by a long course of dealing on the part of the [corporation], with full knowledge of the manner in which the business was done, and with full enjoyment of the fruits of the transaction." A counterclaim on the part of the corporation for moneys received by the bank from the corporation's agent and afterwards drawn out and, as was alleged, misappropriated by him, was also disallowed by the referee below. The court said: "The same principles [applied to support this disallowance]. The authority of the agent to open and maintain the account with the [bank] and to draw against it for the purposes of his agency, being estab-

its credit.[1] But such a general agent, though clothed with the power to contract debts and borrow money on the credit of the corporation, has no power, in virtue of such an agency merely, to make a mortgage on the property of the corporation, real or personal.[2] An agent appointed by the directors of a corporation to superintend and carry on its business, has no power, as such agent, to pledge or mortgage the machinery used by the corporation for the security of a loan.[3] A director may act as the agent of a corporation, with the knowledge of the board, and independently of his duties as director, and his acts will bind the corporation.[4] Corporations may be bound by contracts of their general agents clearly within the scope of their employment, but no further.[5] The general agent of a corporation is not authorized to give its note for a debt due from a previous unincorporated company to which the corporation succeeded.[6] An agent of a corporation, performing the daily routine of his business, under the supervision and control of a board of directors, would not be authorized, as agent, to create a lien upon the entire property of the corporation to secure advances of money to it.[7] Managing officers of a corporation may, without an express delegation of power, or a formal resolution to that effect, employ attorneys to represent the corporation in litigation, or for counsel in its business affairs.[8] The general agent of a corporation organized for

lished by the letter of authority and the course of dealing between the parties, the [bank], in the absence of notice to the contrary, or of facts to put it upon inquiry, had the right to assume that the acts of the agent in this connection were what they purported to be, viz., in the execution of his power as agent. The [bank] was, therefore, entitled to credit for all moneys drawn by the agent in the ordinary course of the business and apparently within the scope of his authority as agent."

[1] Stokes *v.* New Jersey Pottery Co., (1884) 46 N. J. Law, 237.

[2] Stow *v.* Wyse, 7 Conn. 214; C. & N. R. R. Co. *v.* James, 24 Wis. 388.

[3] Despatch Line of Packets *v.* Bellamy Manufacturing Co., 12 N. H. 205.

[4] Holmes *v.* Board of Trade, (1883) 81 Mo. 137.

[5] Odiorne *v.* Maxcy, (1816) 13 Mass. 178.

[6] White *v.* Westport Cotton Manufacturing Co., (1822) 1 Pick. 215.

[7] Whitwell *v.* Warner, 20 Vt. 425. As to power of managing agents, see Stow *v.* Wyse, 7 Conn. 214, 219; Hawtayne *v.* Bourne, 7 Mees. & W. 595; Life & Fire Ins. Co. *v.* Mech. Fire Ins. Co., 7 Wend. 31; Knight *v.* Lang, 4 E. D. Smith, 381; Benedict *v.* Lansing, 5 Denio, 283; Torrey *v.* Dustin Monument Assn., 5 Allen, 329; Despatch Line of Packets *v.* Bellamy, 12 N. H. 205, 228; Luse *v.* Isthmus Transit Ry. Co., 6 Oreg. 122.

[8] Southgate *v.* Atlantic & Pacific R. R. Co., (1875) 61 Mo. 89.

purchasing timber land, converting the timber into lumber and selling it, and for carrying on a trading establishment, has an implied power from the nature of his business to give the negotiable note of the corporation in payment for labor in getting out such lumber.[1]

§ 119. **When the authority of a general agent will not be implied.**— A corporation engaged in a mining business in Michigan had its financial office in New York. Its general agent in Michigan was accustomed to indorse the company's paper for collection or discount, and to draw on the treasurer in New York for the current needs of the corporation, and his drafts were duly paid. He executed several notes in the name of the corporation. In an action upon these notes it was held by the Supreme Court of Michigan that a general agent, without being specially empowered so to do, had no authority to make notes in the name of his principal. Also that the facts stated above as to what he

[1] Tappan *v.* Bailey, (1842) 4 Met. 529. As to power of officers and agents to make contracts, see Blanding *v.* Davenport, I. & D. R. Co., (1894) Iowa, 55 N. W. Rep. 81; Curnan *v.* Delaware & O. R. Co., 138 N. Y. 480; s. c., 34 N. E. Rep. 201; National Cordage Co. *v.* Pearson Cordage Co., 55 Fed. Rep. 812; Huntsville Belt Line & M. S. Ry. Co. *v.* Corpening, (1892) 97 Ala. 681; s. c., 12 So. Rep. 295; Moore *v.* H. Gaus & Sons' Manufg. Co., (1892) 113 Mo. 98; s. c., 20 S. W. Rep. 975; Nichols *v.* Scranton Steel Co., 137 N. Y. 471; 33 N. E. Rep. 561; Teitig *v.* Boesman, 12 Mont. 404; s. c., 31 Pac. Rep. 371; Thompson *v.* Stanley, (N. Y. Super. Ct. Spl T. 1892) 20 N. Y. Supp. 317; Chemical Nat. Bank *v.* Wagner, (Ky. 1894) 20 S. W. Rep. 535; Levey *v.* New York Central & Hudson River R. Co., 24 N. Y. Supp. 124; Humes *v.* Decatur Land Improvement & Furnace Co., (1893) 98 Ala. 461; s. c., 13 So. Rep. 368; Tuller *v.* Arnold, (Col. 1894) 33 Pac. Rep. 445; Reynolds & Henry Construction Co. *v.* Police Jury, 44 La. Ann. 863; s. c., 11 So. Rep. 236; Smith *v.* Car Heater Co., 64 Hun, 639; Glover *v.* Lee, (1891) 140 Ill. 102; s. c., 29 N. E. Rep. 680; Matson *v.* Alley, (1892) 141 Ill. 284; s. c., 31 N. E. Rep. 419, affirming 41 Ill. App. 72; Hamm *v.* Drew, 83 Tex. 77; Johnson *v.* Switch Co., 59 N. Y. Super. Ct. 169; Koch *v.* Association, 137 Ill. 497; s. c., 27 N. E. Rep. 530; Bank of Attica *v.* Manufg. Co., 49 Hun, 606; Bank of Yolo *v.* Weaver, (Cal. 1893) 31 Pac. Rep. 160; Tradesmen's Nat. Bank *v.* Lumber Co., 64 Hun, 635. That officers of a corporation are special and not general agents of the corporation, and their powers being limited by the charter and by-laws, see Adriance *v.* Roome, 52 Barb. 399. As to their power to bind it within the scope of their authority, see Alexander *v.* Brown, 9 Hun, 641. As to power of an agent of a joint-stock corporation formed under the laws of Connecticut, see Wood *v.* Wiley Construction Co., (1887) 56 Conn. 87; s. c., 13 Atl. Rep. 137.

was accustomed to do in the business could not imply authority in him to make such notes.[1]

§ 120. Power of officers generally.—Where persons are named in the statute of incorporation who may bind the corporation, no others can act as the agents of the corporation in the particulars designated in the statute.[2] While the records of a corporation are the best evidence as to who its officers are, it may be shown by parol that one was an agent of the corporation and what his duties as such were.[3] Powers may be conferred upon

[1] New York Iron Mine *v.* First National Bank of Negaunee, (1878) 39 Mich. 644. COOLEY, J., in the opinion, said upon the subject: "It was not disputed by the defense that the corporation had power to make the notes in suit. The question was whether it had in any manner delegated that power to [its general agent]. We cannot agree with the plaintiff that the mere appointment of general agent confers any such power. * * * In McCullough *v.* Moss, 5 Denio, 567, the subject received careful attention, and it was held that the president and secretary of a mining company, without being authorized by the board of directors so to do, could not bind the corporation by a note made in its name. Murray *v.* East India Co., 5 B. & Ald. 204; Benedict *v.* Lansing, 5 Denio, 283, and The Floyd Acceptances, 7 Wall. 666, are authorities in support of the same view. The plaintiff, then, cannot rest its case on the implied authority of the general agent; the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse, to the injury, and indeed, to the utter destruction, of a corporation, that it is wisely left by the law to be conferred or not as the prudence of the board of directors may determine." See, also, Tripp *v.* Swanzey Paper Co., 13 Pick. 293; Union Gold Mining Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531; 2 Colo. 565, 570; In re German Mining Co., 19 E. L. & E. 599; Hawtayne *v.* Bourne, 7 M. & W. 595; Carpenter *v.* Biggs, 46 Cal. 91; Lawrence v. Gebhard, 41 Barb. 575; Sewanee Mining Co. *v.* McCall, 3 Head, 619; Silliman *v.* Fredericksburg, O. & C. R. R., 27 Gratt. 120; Emerson *v.* Providence Hat Co., 12 Mass. 237; Hammond *v.* Michigan State Bank, Walk. Ch. (Mich.) 214; Grover & Baker Sewing Machine Co. *v.* Polhemus, 34 Mich. 247, 249; Reynolds *v.* Continental Ins. Co., 36 Mich. 131; Lyell *v.* Sanbourn, 2 Mich. 109; Marquette & Ontonagon R. R. Co. *v.* Taft, 28 Mich. 289; Kal. Nov. Mfg. Co. *v.* McAlister, 36 Mich. 327. As to corporations authorizing agents to make or indorse notes, see Olcott *v.* Tioga R. R., 40 Barb. 179; Melledge *v.* Boston Iron Co., 5 Cush. 158; White *v.* Westport Cotton Mfg. Co., 1 Pick. 215, 219; Odiorne *v.* Maxcy, 13 Mass. 178; Kelly *v.* Fall Brook Coal Co., 4 Hun, 261; Sedgwick *v.* Lewis, 70 Pa. St. 217; Pahlman *v.* Taylor, 75 Ill. 629; Bird *v.* Daggett, 97 Mass. 494; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. 421; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23.

[2] Landers *v.* Frank St. Meth. Epis. Ch. of Rochester, 97 N. Y. 119.

[3] Leekins *v.* Nordyke & Marmon Co., (1885) 66 Iowa, 471; s. c., 24 N. W. Rep. 1.

the officers of a corporation by a course of conduct of the corporation with its officers and the public which they would not have as such officers but for the usages of the corporation.[1] A corporation will be bound by the acts of one of its officers performed at his office, and where they have been numerous and long continued this justifies a presumption that they were done under instructions of the managers of the corporation.[2] Courts of equity will not interfere with the actions of officers of corporations who may be vested with discretionary powers by statute to correct mere errors of judgment, the power conferred not having been illegally nor unconscientiously executed.[3] One owning a majority of the stock of a corporation cannot act for the corporation in selling leases, for instance, that it may own, unless specially authorized, as a corporation can only act through its officers or by expressly delegating power to others.[4] One openly and notoriously exercising the functions of a particular agency of a corporation will be presumed to have sufficient authority from the corporation to so act.[5] The authority of an officer of a corporation to make a contract in its behalf may be inferred from the fact of the corporation's knowing that he is making such contract, and that it availed itself of whatever benefit arose from the contract.[6] A corporation will be liable upon contracts made by its officers and agents with other persons if these officers or agents, in their negotiations, so act as to induce the persons with whom they make such contracts to believe that they are acting for the corporation, notwithstanding the fact that they were in reality not acting for it.[7] Officers of a corporation have no power to bind the corporation as surety for their private debts.[8] A corporation will not be bound by the release of a debt given to a

[1] Winsor *v.* La Fayette County Bank, (1885) 18 Mo. App. 665.

[2] Beers *v.* Phœnix Glass Co., 14 Barb. 358.

[3] Philips *v.* Wickham, 1 Paige, 590.

[4] Hopkins *v.* Roseclare Lead Co., (1874) 72 Ill. 373.

[5] Singer Manufacturing Co. *v.* Holdfodt, (1877) 86 Ill. 455.

[6] Chicago Building Society *v.* Crowell, (1872) 65 Ill. 453, citing Bradley *v.* Ballard, 55 Ill. 413, 417; Buffit *v.* Troy & Boston R. R. Co., 36 Barb. 420; Abby *v.* Billups, 35 Miss. 618; Parish *v.* Wheeler, 22 N. Y. 494; Noyes *v.* R. & B. R. R. Co., 27 Vt. 111; Bissell *v.* M. S. & N. I. R. R. Co., 22 N. Y. 258; Perkins *v.* Portland, Saco & Portsmouth R. R., 47 Me. 590; Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280, 289; Goodwin *v.* Union Screw Co., 34 N. H. 378.

[7] Wilson Sewing Machine Co. *v.* Boyington, (1874) 73 Ill. 534.

[8] Culver *v.* Real Estate Co., 91 Pa. St. 367.

debtor by one of its officers without authority.[1] A corporation cannot be bound by the act of an officer in a case where he professes to represent only himself and to deal with the corporation as if he had no official relation to it.[2] Under a resolution of the directors of a corporation, directing its officers to use certain notes in liquidating the liabilities of the corporation, the officers may give such notes as collateral security with the note of the corporation itself in payment of its debts.[3] The long usage of officers in issuing stock in exchange for the debt of a corporation for more than two years after the resolution of the board giving them the power had been rescinded, has been held to have implied an authority to make the exchange as effectually as an express resolution.[4] A corporation will not be bound by the declarations of its secretary as to the amount due on a mortgage held by it unless it be shown that the secretary had authority to bind it.[5]

§ 121. The same subject continued.— The president of a corporation will be authorized to purchase the materials to be used in the business of the corporation, and to borrow money for it and give its note for the money borrowed, by a vote of the directors clothing him with full power and control of its business.[6] Where a contract is one which the board of a corporation has power to authorize its president to make or ratify it after it has been made, the burden, if it is claimed to have been unauthorized, is on the corporation to show that it was not authorized or ratified by its board.[7] A manufacturing corporation cannot be

[1] Land Co. *v.* Sloan, 109 Pa. St. 532.

[2] Winchester *v.* Baltimore & Susquehanna R. R. Co., 4 Md. 231.

[3] Brookman *v.* Metcalf, 5 Bosw. 429.

[4] Lohman *v.* New York & Erie R. R. Co., 2 Sandf. 39.

[5] Johnston *v.* Building Association, 104 Pa. St. 394.

[6] Castle *v.* Belfast Foundry Co., 72 Me. 167. What is within the scope of the business intrusted to a president of a corporation. Seeley *v.* San José Independent Mill & Lumber Co., (1881) 59 Cal. 22. What kind of a transaction a board of directors or stockholders can sanction or ratify. Forbes *v.* San Rafael T. Co., 50 Cal. 340. As to a note signed by president and secretary, see Duggan *v.* Pacific Boom Co., (Wash. 1893) 34 Pac. Rep. 157. As to a president's authority, see Crowley *v.* Genesee Mining Co., 55 Cal. 273; Union Mut. Life Ins. Co. *v.* White, 106 Ill. 67.

[7] Patterson *v.* Robinson, (1889) 116 N. Y. 193; s. c., 22 N. E. Rep. 372; citing Bank of Vergennes *v.* Warren, 7 Hill, 91; Gillett *v.* Campbell, 1 Den. 520; Elwell *v.* Dodge, 33 Barb. 336; Chemical National Bank *v.* Kohner, 85 N. Y. 189, 193; Smith *v.* Hull Glass Co., 11 C. B. 897, 929; Lee *v.* Pittsburgh Coal & Mining Co., 56 How. Pr. 373;

bound by a contract of one who is a stockholder and director and overseer of part of its business, to aid in the extension of a railroad.[1] The treasurer of a savings bank, by virtue of his office merely, has no implied authority to transfer to a purchaser a promissory note belonging to the bank.[2] A vote of a newly-

affirmed in 75 N. Y. 601. See, also, Patteson *v.* Ongley Electric Co., (1895) 87 Hun, 462; s. c., 34 N. Y. Supp. 209; citing Jourdan *v.* Railroad Co., 115 N. Y. 381; s. c., 22 N. E. Rep. 153; Oakes *v.* Water Co., 143 N. Y. 430; s. c., 38 N. E. Rep. 461.

[1] New Haven & Northampton Co. *v.* Hayden, (1871) 107 Mass. 525. As to authority of officers to make contracts, see Baker *v.* Harpster, 42 Kans. 511; s. c., 22 Pac. Rep. 415; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248; s. c., 20 N. E. Rep. 222; Read *v.* Buffum, 79 Cal. 77; s. c., 21 Pac. Rep. 555; Eureka Iron Works *v.* Bresnahan, 60 Mich. 332; s. c., 27 N. W. Rep. 524; Merrill *v.* Consumers' Coal Co., 114 N. Y. 210; s. c., 21 N. E. Rep. 155.

[2] Holden *v.* Upton, (1883) 134 Mass. 177. As to what authority, *ex officio*, an officer has, see Farmers' Bank *v.* McKee, 2 Barr, (Pa.) 318; Hallowell & Augusta Bank *v.* Hamlin, 14 Mass. 178, 180; Crump *v.* United States Mining Co., 7 Gratt. 352. Where it would not be assumed that the treasurer of a board of trustees of a corporation had no authority to make an indorsement upon a note. Sayers *v.* First National Bank, (1883) 89 Ind. 230. In Blake *v.* Holley, 14 Ind. 383, it was held that a corporation might authorize its proper officer to assign a note by delivery, and perhaps it would be within the general powers of officers of a railway corporation to assign, in such manner as they might deem expedient, its choses in action. In Schallard *v.* Eel River Steam Navigation Co., (1886) 70 Cal. 144; s. c., 11 Pac. Rep. 590, it was held that a mortgage executed in the name of a corporation by its president and secretary and having the corporate seal attached, must be presumed to have been executed in pursuance of a due authorization to such officers, and the burden of proof was on the corporation to show the contrary. Also, that where the circumstances surrounding the execution of the mortgage showed the existence of proper resolutions of authorization and supported the presumption of its authoritative execution as shown by affixing the corporate seal, and the signatures of the proper officers, the mere fact that such resolutions did not appear in the proper book of the corporation was not sufficient to disprove their existence and invalidate the mortgage. See, also, Southern California Colony Association *v.* Bustamente, 52 Cal. 192–196. Where acts of officers and agents in making contracts have been held to bind the company. Powder River Live Stock Co. *v.* Lamb, (Neb. 1894) 56 N. W. Rep. 1019; Greig *v.* Riordan, 99 Cal. 316; s. c., 33 Pac. Rep. 913; Carrigan *v.* Port Crescent Imp. Co., 6 Wash. 590; s. c., 34 Pac. Rep. 148; Oro Mining & Milling Co. *v.* Kaiser, (1894) 4 Colo. App. 219; s. c., 35 Pac. Rep. 677. Agreement of officers that will bind a corporation. Outterson *v.* Fonda Lake Paper Co., 66 Hun, 629; s. c., 20 N. Y. Supp. 980. When a note signed by the president, secretary and two directors will be held to be the note of the corporation. In re Pendleton Hardware & Imp. Co., (1893) 24 Ore. 330; s. c., 33 Pac. Rep. 544. See, also, Reeve *v.* Bank, 54 N. J. Law. 208; Davis *v.* Lee Camp No. 1, C. V. (Va. 1894) 18 S. E. Rep. 839; Cross *v.*

formed manufacturing corporation contemplated the payment of royalties to and the purchase from an existing corporation in addition to tools and material of "all the other personal estate of said corporation, giving in payment therefor" a certain number of shares of stock in the new corporation to be issued to the president of the old corporation as trustee for the parties in interest, any balance of such shares remaining "after paying the liabilities" of the old corporation to be issued to the treasurer of the new corporation. A written contract, purporting to be made between the two corporations, was signed by their presidents, who were the principal creditors of the old corporation, by which the new corporation, in consideration of the transfer of all the stock, tools, materials and machinery of the old one, and of its agreement to license the new one under all its patents, agreed to pay, besides royalties, all the debts of the old corporation. No director or stockholder of the new corporation besides the president, knew anything of the particulars in which the contract departed from the terms of the vote. The Supreme Court of Massachusetts held, in an action on the contract, that there was no evidence for a jury of the authority of the president of the new corporation to make or sign the contract or of its ratification.[1] A corporation cannot be bound by a contract made by a promoter of the corporation in obtaining a subscription of stock before the organization of the corporation. But after its organi-

Anglo-American Banking Co. (1894) 79 Hun, 424; s. c., 29 N. Y. Supp. 960; Merchants & Farmers' Bank *v.* Hervey Plow Co., 45 La. Ann. 1214; s. c., 14 So. Rep. 139; Prindle *v.* Washington Life Ins. Co., 73 Hun, 448; s. c., 26 N. Y. Supp. 474; Prentice *v.* United States & Central American Steamship Co., 58 Fed. Rep. 702. Whether or not the acts of officers or agents bind the corporation. Stanley *v.* Sheffield, L. I. & C. Co., 83 Ala. 260; s. c., 4 So. Rep. 34; Whitaker *v.* Kilroy, 70 Mich. 635; s. c., 38 N. W. Rep. 606; Little *v.* Kerr, (N. J.) 14 Atl. Rep. 613; Templin *v.* Chicago, B. & P. R. Co., 73 Iowa, 548; s. c., 35 N. W. Rep. 634; St. Louis, Fort Scott & W. R. Co. *v.* Grove, 39 Kans. 731; s. c., 18 Pac. Rep. 958; Topeka Primary A. U. B. *v.* Martin, 39 Kans. 750; s c., 18 Pac. Rep. 941; Griffith *v.* Chicago, B. & P. R. Co., 74 Iowa, 85; s. c., 36 N. W. Rep. 901; Merchants' Nat. Bk. of Chicago *v.* Detroit Knitting & Corset Works, 68 Mich. 620; s. c., 36 N. W. Rep. 696; New York, P. & N. Ry. Co. *v.* Bates, 68 Md. 184; s. c., 11 Atl. Rep. 705; Getty *v.* C. R. Barnes Milling Co., 40 Kans. 281; s. c., 19 Pac. Rep. 617; East Rome Town Co. *v.* Brower, 80 Ga. 258; s. c., 7 S. E. Rep. 273; Bank of Attica *v.* Pottier & Stymus Mfg. Co., 49 Hun, 606; s. c., 1 N. Y. Supp. 483.

[1] Bi-spool Sewing Machine Co. *v.* Acme Manufacturing Co., (1891) 153 Mass. 404.

zation the corporation may ratify it and be estopped from denying its liability upon such a contract.[1]

§ 122. Power of directors — general rules.— The directors have control of the ordinary management of a corporation.[2] But a corporation cannot be bound by the acts of individual directors.[3] A board of directors may, under their power to make by-laws, delegate their authority to a quorum composed of less than a majority of their number, notwithstanding a declaration in the charter of the corporation that its powers shall be exercised by a board of directors, consisting of a specified number.[4] A director who is permitted to act as such after he has sold all his stock in a corporation is a director *de facto*, and the proceedings of the board, in which he takes part, are valid as to third persons.[5] To bind a corporation by an express promise, the individual directors must be authorized; otherwise they have no power to bind it.[6] A corporation will be bound by the action of its directors, though acting separately, if in the usual sphere of directors.[7] The acts

[1] Joy *v.* Manion, 28 Mo. App. 55. See Fawcett *v.* New Haven Organ Co., 47 Conn. 226, as to the circumstances under which a contract made by a secretary and treasurer was held not to bind the corporation. When contracts made by officers are not binding on corporation. Banks *v.* New York Club, 68 Hun, 92; s. c., 22 N. Y. Supp. 727; Bank of New York *v.* American Dock & Trust Co., (1893) 70 Hun, 152; s. c., 24 N. Y. Supp. 406. For a full discussion on this subject, see Edwards *v.* Carson Water Co., (Nev. 1893) 34 Pac. Rep. 381. When authority of officers to indorse a note of the corporation is shown. National Bank of Battle Creek *v.* Mallan, (1887) 37 Minn. 404; s. c., 34 N. W. Rep. 901; First National Bank of Rock Island, Illinois, *v.* Loyhed, (1881) 28 Minn. 396; s. c., 10 N. W. Rep. 421; Farmers' Nat. Bank of Valparaiso, Ind., *v.* Sutton Manufacturing Co., (1892) 52 Fed. Rep. 191; s. c., 6 U. S. App. 312; 3 C. C. A. 1. As to corporations not being liable for debts contracted by the corporators before incorporation, see Hutchinson *v.* Surrey Consumers' Gas Light & Coke Association, 73 Eng. C. L. 689; White *v.* Westport Cotton Co., 1 Pick. 215; In re The Independent Assur. Co., 30 L. J. Rep. (Eq.) 222.

[2] Genesee County Savings Bank *v.* Michigan Barge Co., 52 Mich. 438; s. c., 17 N. W. Rep. 790; 18 N. W. Rep. 206.

[3] Lockwood *v.* Thunder Bay River Boom Co., 42 Mich. 537; 4 N. W. Rep. 292.

[4] Hoyt *v.* Thompson, 19 N. Y. 207.

[5] Wile & Brickner Co. *v.* Rochester & K. F. Land Co., (1893) 4 Misc. Rep. 570; 25 N. Y. Supp. 794. See, also, Despatch Line of Packets *v.* Bellamy Manufg. Co., 12 N. H. 205; In re Mohawk & H. R. Co., 19 Wend. 135.

[6] Workhouse *v.* Moore, 95 Pa. St. 408.

[7] Foot *v.* Rutland & Whitehall R. R. Co., 32 Vt. 633.

of a board of directors of a corporation, evidenced by a written vote, as completely bind the corporation, and are as complete authority to its agents, as the most solemn acts done under the corporation seal.[1] The power of directors to bind a corporation by their contracts may be exercised by a majority of the board. It is not necessary that all the doings of a board of directors should be entered on their records. The corporation will be bound by any verbal order or direction, in which a majority of the board concurs in relation to any matter of business intrusted to them.[2] An act purporting to be the act of a board of directors at a meeting of such board may be presumed to be the act of a majority of the board, unless shown to the contrary.[3] Other circumstances proving the consent of directors to a contract, it is not necessary, to bind the corporation, that the records of the board should disclose a formal vote of the directors.[4] The power placed by a charter in the directors cannot be limited by a by-law of a corporation.[5] A charter of a corporation providing that the president is entitled to all the powers and privileges of a director, and requiring seven directors to make a quorum, the president and six directors would constitute such a quorum.[6] In the absence of a special provision in a charter of a corporation upon the subject, less than a majority of the board of directors have no power to transact business. Their acts are absolutely void and the corporation cannot ratify them.[7] That it is provided in a charter of a corporation that a majority of the directors present at a regular meeting would be competent to decide on all business, is not a declaration that a minority of the directors, however small, may act as a board.[8] There is no power in the directors of a corporation to bind it by an agreement for extra

[1] Campbell *v.* Pope, (1888) 96 Mo. 468; s. c., 10 S. W. Rep. 187.

[2] Cram *v.* Bangor House Proprietary, (1835) 12 Me. 354 In Trott *v.* Warren, (1834) 11 Me. 227 it was held that a contract, made by a minority of a committee of a corporation, and not assented to by a majority, nor by the corporation, was not valid.

[3] Despatch Line of Packets *v.* Bellamy Manufacturing Co., 12 N. H. 205.

[4] Nashua & Lowell Railroad Co. *v.* Boston & Lowell R. R. Co., 27 Fed. Rep. 821.

[5] Union Insurance Co. *v.* Keyser, 32 N. H. 313; Campbell *v.* Merchants & Farmers' Insurance Co., 37 N. H. 35.

[6] Bank of Maryland *v.* Ruff, 7 G. & J. (Md.) 448.

[7] Price *v.* G. R. & I. R. Co., (1859) 13 Ind. 58.

[8] Ex parte Willcocks, 7 Cow. 402.

compensation, not made at a meeting of the board.[1] Directors of a bank, in case a deficit in the funds appears by the accounts of its cashier, have authority to make a settlement with such officer.[2] A corporation having power by its charter "to make contracts in writing, and signed by the president and secretary, or by such other officer or officers as the directors may appoint for that purpose," the directors may authorize the president alone to sign for the company. Proof of the formal vote of the directors giving him such authority is not necessary.[3] After seven years' acquiescence by a corporation in the lease of its property by its directors, something more must be shown than that it was executed in excess of the powers of the directors before the lessee will be required to surrender the profits he may have made upon it.[4]

§ 123. **Directors for the first year.**—The New York Court of Appeals has considered the objections to the validity of a mortgage executed by a manufacturing corporation formed under the statute of 1848 relating to such corporations, that the persons acting as a board of directors for the mortgagee were not, at the time of passing the resolution authorizing the mortgage, stockholders of the company, and were, therefore, not qualified under the statute to act as such directors. The court held the objection not tenable, and RUGER, Ch. J., for the court, *arguendo*, said: "The provisions of the statute (§ 3, chap. 37, Laws of 1848) requiring the stock, property and concerns of such company to be managed by directors who shall respectively be stockholders of the company, and who shall, except the first year, be annually

[1] Stoystown & Greensburg Turnpike Road Co. *v.* Craver, 45 Pa. St. 386.

[2] Frankfort Bank *v.* Johnson, (1844) 24 Me. 490.

[3] Topping *v.* Bickford, (1862) 4 Allen, 120. In Sampson *v.* Bowdoinham Steam Mill Corporation, 36 Me. 78, it was held that an action could be maintained against the corporation upon a document signed by its directors in that capacity certifying that the holder of it had previously advanced a specified sum of money for the corporation, under the authority given in its by-laws to the directors to manage all its prudential concerns.

[4] Pneumatic Gas Co. *v.* Berry, (1884) 113 U. S. 322; s. c., 5 Sup. Ct. Rep. 525. The court said: "A court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal which had its approval which were essential to its protection, and the benefits of which it has fully received. Complaints that its own directors exceeded their authority come with ill grace when the acts complained of alone procured its existence."

elected by the stockholders, do not apply to the original organization of a company formed under said act. The language of section 1 of the act, by express terms, makes the persons named in the certificate of incorporation as such, directors of the company for the first year of its existence, and confers upon such persons full power to act as directors in the performance of any corporate duty after the filing of such certificate. The corporate authority of such an organization must, from necessity, be coincident with the inception of its corporate existence, and antedate the acquisition by it of property, or the issue of stock certificates representing such property. It is conceded that the persons passing the resolution were those named as directors in the original certificate of incorporation, and the purchase of the property in question was one of the first official acts of the corporation; that the property thus purchased of the plaintiff furnished the basis of capital upon which their corporate stock was distributed, and that certificates for its entire amount in payment of such purpose were issued and delivered to the plaintiff simultaneously with the conveyance of the property to the corporation by him and the delivery to him of the mortgage. It is quite obvious that the statute cannot be made effective under any other interpretation, and it is a primary rule of construction to give some effect to the expressions of the legislative will, if consistent with a reasonable interpretation of its language. If its provisions be so construed as to require the existence of stockholders before there is a legal organization, it must necessarily defeat the creation of any corporation under it, as it is quite manifest that stock cannot be owned in a corporation which has itself no legal existence. The terms of the act providing for the appointment of directors for the first year do not require such an interpretation, and it is contrary to reason and settled rules of construction to ascribe to a statute such a meaning as will nullify its operation if it is capable of any other interpretation." [1]

§ 124. **Directors de facto.**—One who had been adjudged entitled to a premium on cattle exhibited at the fair of an agricultural society in Pennsylvania brought his action for its recovery. It appeared that certain directors of the corporation who had, in proceedings *quo warranto*, been adjudged not to be the legal

[1] Davidson *v.* Westchester Gas Light Co., (1885) 99 N. Y. 558, 565, 566.

officers, had offered these premiums, and the corporation defended on the ground that the acts of this board were not binding upon them, they not being directors *de jure*. The findings of the trial judge were that this board of directors "held the possession of the books of the corporation and the custody and control of its property, both personal and real. It was under their direction and management that the fair was held, and all purchases made for the purpose of holding the fair. They had custody also of all moneys paid as entrance fees, as well as all moneys received for admission. The premiums, for the recovery of which these suits were brought, were premiums offered by this board of directors." The judge held that the acts of the *de facto* directors were binding upon the corporation, which was affirmed by the Supreme Court.[1]

§ 125. **Illustrations of the power of directors.**— It is within the power of a board of directors of a manufacturing corporation, clothed with authority to manage its concerns, to authorize the agent of the corporation to raise money for his own use by

[1] Zearfoss *v.* Farmers & Mechanics' Institute of Northampton County, (1893) 154 Pa. St. 449; s. c., 26 Atl. Rep 211. In the opinion *per curiam* it was said: "Contracts entered into by a corporation *de facto* are binding after having been executed by either party. 2 Morawetz on Corp. §§ 750, 752. The act of an officer *de facto* is good whenever it concerns a third person who had a previous right or had paid a valuable consideration for it. Angell & Ames on Corp. (11th ed.) §§ 287, 286, 299. An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons. State *v.* Carroll, 38 Conn. 449. Our own cases are to the same effect. Riddle *v.* County of Bedford. 7 S. & R. 386, 392; McGargell *v.* Hazleton Coal Co., 4 W. & S. 424-425. In the latter it was held that 'a corporation may act by means of an officer *de facto* as fully and effectually as regards the public and third persons as by an officer *de jure*,' in all matters within the scope of the corporation's ordinary business." To the contention that there is a distinction between *de facto* officers of public corporations and *de facto* officers of private corporations it was said: "While such a distinction appears to be recognized in some of the cases cited and relied on by [counsel], we are not convinced that it is sound. The weight of authority, in this country especially, is decidedly against it. In the case of public corporations, the reasons for holding the acts of *de facto* officers binding on the corporations they represent are doubtless stronger than in the case of private corporations; but, to some extent at least, they are the same in both, differing only in degree." As to a corporation being bound by the acts of its officers *de facto*, see Cahill *v.* Kal. Mut. Ins. Co., 2 Douglass, (Mich.) 124.

giving therefor a "company note," where this is intended as an advance or payment of the agent's wages.[1] Where full power to conduct the affairs of a corporation are by its charter vested in its president and directors, they have the right to authorize the president to indorse its notes.[2] The power to modify the terms of a guaranty of one corporation to another of a certain annual dividend on its capital stock, under an agreement between the two corporations, is in the directors and not in the stockholders of the corporation, and a court will not interfere in case the board exercise the power fairly and in good faith.[3] The custody of the assets of a corporation may properly be placed with a managing director, and if he is allowed by the corporation to hold himself out to the public as competent to dispose of its assets, the public are entitled to presume that he has authority to dispose of them.[4] There being power in corporate authorities, and generally the directors, to compromise corporate debts, they can release a part of a subscriber's liability in case there is doubt about it, for the purpose of securing the rest; and a compromise of that kind will bind the stockholders of any new corporation to which the property and rights of the existing corporation may be transferred, notwithstanding the fact that it cannot extinguish rights that have already been acquired by creditors.[5] In case there is no restraint by law or contract upon the power of the directors of a corporation, they may make any disposition of the profits of its business deemed by themselves to be judicious.[6] A completed contract between a corporation and an individual for the sale of stock by the individual to the corporation could not be proven by statements of individual directors out of a session of the board, and not accompanying any official act, and statements made by them in debate while in session.[7] The by-laws of a business corporation giving the directors authority to appoint a treasurer, they may do so without any formal meeting; and, there being no prohibition in the charter or by-laws, may agree with the treasurer as to his compensation.[8] All business of a corporation relating to

[1] Tripp *v.* Swanzey Paper Co., (1832) 13 Pick. 291.

[2] Merrick *v.* Trustees of the Bank of Metropolis, 8 Gill. (Md.) 64.

[3] Flagg *v.* Manhattan Ry. Co., 10 Fed. Rep. 413.

[4] Walker *v.* Detroit Transit R. Co., 47 Mich. 338; s. c., 11 N. W. Rep. 187.

[5] Whitaker *v.* Grummond, 68 Mich. 249; s. c., 36 N. W. Rep. 62.

[6] Park *v.* Grant Locomotive Works, 13 Stew. (N. J. Eq.) 114.

[7] Peek *v.* Detroit Novelty Works, 29 Mich. 313.

[8] Waite *v.* Mining Co., 37 Vt. 608; Waite *v.* Mining Co., 36 Vt. 18. As to

the legitimate objects of its creation may be transacted by the directors without the sanction of the stockholders. Where it has under its charter the power to borrow money and secure the same by deed or lien on its real or personal property, or both, or borrowing money for the purpose of forwarding the objects of the corporation is among the ordinary duties of the board of directors, it follows that the board may secure the loan by deed or other lien. This is a part of the business transactions of a corporation which has always been regarded as within the province of the directors to perform.[1] The stockholders of a corporation would be estopped to deny the authority of its directors to borrow money and make a mortgage of the corporation's property to secure the loan, even if they were not authorized to do so, if they ratify the action of the directors in effecting the loan and mortgaging the property by approving the minutes of their proceedings before the loan is effected, and afterward receive the benefit of the loan and pay interest on it.[2] A railroad corporation may be bound by its directors under the powers usually conferred upon them to pay interest on stock subscribed until the completion of a portion of its road.[3]

§ 126. **More illustrations on the same subject.**— The Supreme Court of Colorado has held that a proposition by the officers of a private corporation to pay a party $5,000 in the stock of the company for his services, if he would procure a loan of $15,000 for the use of such corporation, or a proportionate amount of stock for a smaller loan, duly accepted and acted on, warranted the finding in this case of an agreement to pay such party, in the capital stock of the corporation, thirty-three and one-third per cent of any sum he could procure to be loaned it; also, that the officers acted in behalf of the corporation, although the president testified that the stock was to be furnished by the officers individually.[4] Directors authorized to receive subscrip-

contracts made by directors, see Fisher *v.* Gas Company, 1 Pears. (Pa.) 118; Martin *v.* Railway Co., 37 Leg. Int. 132.

[1] Wood *v.* Whelen, (1879) 93 Ill. 153.

[2] Aurora Agr. & Hort. Society of Aurora *v.* Paddock, (1875) 80 Ill. 263.

[3] Milwaukee & Northern Illinois R. R. Co. *v.* Field, 12 Wis. 340.

[4] Arapahoe Cattle & Land Co. *v.* Stevens, (1889) 13 Colo. 534; s. c., 22 Pac. Rep. 823. The court, in the opinion, discussed the question whether the contract was within the scope and authority of the officers making it and binding upon the corporation as follows: "As we have

tions for stock, payable "in such manner as the board of directors should direct," may receive payment in promissory notes.[1] Under the authority of the president and directors of a corporation to manage the affairs of the corporation they may make an

already seen, the corporation was organized for the purpose of buying and selling lands, horses, cattle, etc., also all other business incidental to stock raising. [The president and secretary] were general officers of the company, and must be presumed to have the powers usually conferred upon such officers. In addition to this, they were duly empowered to purchase the Gebhardt stock, etc., [for which purpose the money loaned was to be used], and this authority must be held to be as broad as the transaction. The power to purchase necessarily carried with it the power to obligate the company to pay, notwithstanding the fact that a by-law of the company forbade the contracting of any debt for the company except by order of the board of directors. Plaintiff was not a member of the company, and his rights cannot be affected by a by-law restricting the general powers of the officers of the company, of the existence of which by-law he is not shown to have had notice. Moraw. Priv. Corp. § 500; Ang. & A. Corp. 370, note a; Flint *v.* Pierce, 99 Mass. 68–70; Royal Bank of India's Case, L. R. (4 Ch.) 252; Maher *v.* City of Chicago, 38 Ill. 266." The question of the payment for services of the agent negotiating the loan in stock of the company also received the attention of the court in this case. They said, upon that question: "It is not necessary that shares in a corporation be paid for in cash. It has been held that the managing officers for a corporation may, in their discretion, issue full paid-up shares for real estate, labor and materials useful in carrying on the corporate business. In fact, such payment may usually be made in money or its equivalent, and, if in the latter, the transaction cannot be impeached for error of judgment on the part of the officers of the company as to the value of the services or property. Good faith and the exercise of an honest judgment meet the requirements of the law. Moraw. Priv. Corp. §§ 426, 429; Schenck *v.* Andrews, 57 N. Y. 133; Douglass *v.* Ireland, 73 N. Y. 100; Iron Co. *v.* Drexel, 90 N. Y. 87; Lorillard *v.* Clyde, 86 N. Y. 384. The [cases just cited] were all decided under the provisions of the act of 1853 of the state of New York, which act was amendatory to the provisions of a previous law of the state requiring that nothing but money should be received as payment for the stock of incorporated companies. By the amendment the trustees of such companies were authorized to purchase any property necessary for the corporate business, and in payment therefor to issue stock 'to the amount and value thereof.' Under this act it may now be considered as the settled doctrine in that state that the trustees, in taking property, must exercise their discretion, and that their judgment as to the value of the property, and the necessity for it will not be interfered with, in the absence of fraud. Thus it is said in Schenck *v.* Andrews, *supra*: 'They were the agents in behalf of the company, for that purpose, and the discharge of their duty called for the exercise of their discretion and judgment (having reference and due

[1] Magee *v.* Badger, 34 N. Y. 247.

order requiring payment of an installment on the stock.[1] A corporation cannot be held to have contracted unless by such agents or officers as have express or implied authority. Individual directors have no power whatever to bind a corporation.[2] A board of directors, when no express restraint appears to have been imposed upon it, may, in a case where a contract has been made between two corporations and circumstances indicate an inability on the part of one party to the contract to fulfill the terms of the agreement, compromise or adjust the matter between the two corporations on a basis dispensing with full and complete performance.[3]

§ 127. Illustrations of a lack of power in directors.— Directors of a corporation cannot delegate their authority or any portion of it requiring the exercise of judgment and discretion, unless, as conferred upon them, the authority includes the power of substitution in express terms, or by necessary implication.[4] Directors of a corporation have no authority to sell the stock of the corporation at a less sum than the price fixed in the charter.[5]

regard to the interests of those represented by them) in determining what should be bought, and the price to be paid therefor. It cannot be properly claimed, in giving a construction to the power conferred on them by the amendatory act, that the property purchased, and every part thereof, should be indispensable for the prosecution of the business of the company, or that the sum allowed therefor should be its precise, actual, intrinsic value (and that to be determined by a jury), for the exemption of a stockholder from the liability which the original act imposed, in case the whole capital was not actually paid in cash. Such a construction would defeat the evident object of the law, which clearly was to encourage the formation of companies by the appropriation of manufactories, mines and other property, proper for their business, and at a fair valuation, instead of money as a capital therefor. No person could be expected to become a stockholder and pay his money or appropriate his property, and he, nevertheless, be held liable to a contribution in favor of creditors, to the extent of the stock issued for such property, if a jury should subsequently, and at an indefinite and unlimited period thereafter, find that the trustees had, under a mistake, but in an honest exercise of their judgment, concluded erroneously either that the property was in fact, as disclosed by subsequent events, not absolutely indispensable, or actually worth the full sum allowed for it.' "

[1] Union Turnpike Co. *v.* Jenkins, 1 Caines, 381.

[2] Lockwood *v.* Thunder Bay River Boom Co., (1880) 42 Mich. 536, 539; adhered to in Hartford Iron Mining Co. *v.* Cambria Mining Co., (1890) 80 Mich. 491.

[3] People ex rel. Content *v.* Metropolitan Elevated Ry. Co., 26 Hun, 82.

[4] Gillis *v.* Bailey, 21 N. H. 150.

[5] Oliphant *v.* Woodburn Coal & Mining Co., (1884) 63 Iowa, 332; s. c., 19 N. W. Rep. 212. On this point, see

Neither can they accept property for a stock subscription at a price largely in excess of its value.[1] And a subscriber who received the shares for such property originally, or a transferee of such shares with notice, at the suit of any one injured thereby, may be compelled to make up the difference in value.[2] Directors of a corporation alone cannot increase the capital stock of a corporation unless expressly authorized. The general power to perform all corporate acts which they may have refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock.[3] The subscriber to the stock of a railroad corporation cannot be released from his liability for his subscription by its directors.[4] It is not within the power of officers of a corporation to ratify an unauthorized act of their own.[5] No express promise of an individual director of a corporation, unless authorized, will bind the corporation.[6] A parol contract made by the directors of a bank is not binding on the corporation.[7] The stock of a member cannot be relieved by the president and directors of a corporation from forfeiture of its dividends by their advancing the money of the corporation to satisfy the conditions on which a forfeiture of dividends depends, as it is not in their power to do so.[8] The act of a president of a corporation, which the directors themselves have no authority to perform, cannot be ratified by the directors.[9] Where a charter, while giving the directors of a corporation the power to manage its stock, property and affairs, provides that the corporation should have the power to assess the stockholders in order to pay the corporation debts, its directors cannot exercise the power of assessment without authority from the corporation.[10] There is no power in a

Sturges *v.* Stetson, 1 Biss. 246; Fosdick *v.* Sturges, 1 Biss. 255; Mann *v.* Cooke, 20 Conn. 188; Fisk *v.* C., R. I. & P. R. Co., 53 Barb. 472, 513; O'Brien *v.* C., R. I. & P. R. Co., 53 Barb. 568; Neuse River Navigation Co. *v.* Commissioners, 7 Jones Law (N. C.), 275.

[1] Osgood *v.* King, 42 Iowa, 478.

[2] Jackson *v.* Traer, (1884) 64 Iowa, 469; s. c., 20 N. W. Rep. 764. See Bailey *v.* Pittsburg & Connellsville Gas, Coal & Coke Co., 69 Pa. St. 334; Boynton *v.* Hatch, 47 N. Y. 225; Tallmadge *v.* Fishkill Iron Co., 4 Barb. 382.

[3] Railway Co. *v.* Allerton, (1873) 18 Wall. 233.

[4] Bedford Railroad Co. *v.* Bowser, 48 Pa. St. 29.

[5] Hotchin *v.* Kent, 8 Mich. 526.

[6] Workhouse *v.* Moore, 95 Pa. St. 408.

[7] Hughes *v.* Bank of Somerset, (1824) 5 Litt. (Ky.) 45.

[8] Marine Bank *v.* Biays, 4 H. & J. (Md.) 338.

[9] Crum's Appeal, 66 Pa. St. 474.

[10] Marlborough Manufacturing Co. *v.* Smith, 2 Conn. 584.

simple director or vice-president of a railroad company, by virtue of his office, to appoint agents to sell the lands or the timber on them.[1] Without special authority, a director, as such, cannot make notes binding the corporation.[2] The directors of a rail way corporation cannot give away its stock.[3] A committee of its directors, authorized by a railroad corporation to enter into a contract for the construction of its road, after the contract is executed, would have no power to modify the contract as originally made.[4] Directors, though they may compromise an existing claim, have no implied power to make new agreements radically modifying previous agreements which they did not make and had no power to make.[5] The directors of a corporation have no power to make a donation from, or misappropriate the funds of the corporation in violation of the laws and rules regulating its mode of action.[6]

§ 128. When notes will be held to have been authorized by a board of directors.— In a case in the federal court for the district of Kansas it was urged that certain notes issued by a railroad company were in violation of a by-law of the company, which prohibited the giving of notes, bonds, bills, acceptances, etc., by the company unless ordered by the board of directors. FOSTER, J., said upon this that "[one] note was made by positive order of the board of directors, and by the president and secretary, as therein directed. Some by-law of the company required notes to be made to the order of the president and secretary. This is a mere matter of form, and not material. The other notes were made [before the adoption of the by-law], and besides, the board of directors at their meeting [held nine months before their execution], directed that orders be drawn on the company for [their amount]. Orders are not notes, but that order of the board would, doubtless, have been good for acceptances, which stand on the same footing as notes under the by-laws."[7]

[1] Chicago & Northwestern R. Co. *v.* James, 22 Wis. 194.

[2] Lawrence *v.* Gebhard, 41 Barb. 575.

[3] Thornton *v.* St. Paul, etc., R. R. Co., 6 N. Y. Wkly. Dig. 309.

[4] Western R. R. Co. *v.* Bayne, 11 Hun, 166.

[5] Metropolitan Elevated Ry. Co. *v.* Manhattan Ry. Co., (Spl. Term Sup. Ct. 1884) 14 Abb. N. C. 103; s. c., 11 Daly, 373.

[6] Frankfort Bank *v.* Johnson, (1844) 24 Me. 490.

[7] Stewart *v.* St. Louis, Ft. S. & W. R. Co., (1887) 41 Fed. Rep. 736. In Wile

§ 129. **Waiver by directors of their power to repudiate a contract.**— The officers of a corporation being made subject by the by-laws of a corporation to its board of directors, provided the board elect to exercise such control, should the board for some length of time fail to repudiate a contract made by the superintendent and treasurer of the corporation, their failure so to act will be presumed to operate as a waiver of their power.[1]

§ 130. **Power of trustees of a corporation.**— The trustees of a corporation have authority to enter into contracts for the payment of money, under the corporate seal, in furtherance of

& Brickner Co. v. Rochester & K. F. Land Co., (1893) 4 Misc. Rep. 570; s. c., 25 N. Y. Supp. 794, where notes were given by the corporation to two of its directors in payment for property purchased from them, the resolution to purchase and to give the notes having been adopted at a directors' meeting when the vendors were present and were necessary to constitute a quorum, but they did not vote on the resolution, it was held that though the transaction was voidable as between the corporation and its directors, the notes so given were valid in the hands of a *bona fide* purchaser, who, before taking them, asked the corporation's secretary about them, and was informed that they had been authorized by the board of directors. The court distinguished People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 513; s. c., 17 N. E. Rep. 408, in that in that case it appeared affirmatively that the officers who signed the note acted separately and not at a meeting of the board, and that there was no corporate act as a basis of their authority so to do.

[1] Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R. Co., 26 Fed Rep. 140. Affirmed in Indianapolis Rolling Mill v. St. Louis, Fort Scott & Wichita Railroad, (1887) 120 U. S 256; s. c., 7 Sup. Ct. Rep. 542, in which case the Supreme Court of the United States said: "The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if they had the right to disaffirm it they should do it promptly, and if after a reasonable time they did not so disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that if the suit brought in this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release. It was stated in the somewhat analogous case of The Twin-Lick Oil Co. v. Marbury, 91 U. S. 592, 'the authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done after the party, with whom that right is optional, is aware of the facts which gave him that option are numerous. * * * The more important are as follows: Badger v. Badger, 2 Wall. 87; Harwood v. Railroad Co., 17 Wall. 78; Marsh v. Whitmore, 21 Wall. 178; Vigers v. Pike, 8 Cl. & Fin. 650; Wentworth v. Lloyd, 32 Beav. 467; Follansbe v. Kilbreth, 17 Ill. 522; s.

the business of the corporation.[1] A corporation may be bound by the contract of a board of trustees holding their office under a judicial decision declaring their title to the office. And the corporation will not be relieved from its liability by a subsequent reversal of this decision on appeal.[2] Under the law of California empowering the trustees of a corporation formed under the general laws of that state, to levy and collect, for the purpose of paying expenses incurred in the management of the corporation's business, assessments upon the capital stock of the corporation not to exceed five per cent of such capital stock, provided no previous assessment then remained unpaid or uncollected,[3] such trustees, where the expenses incurred in the management have largely exceeded ten thousand dollars, may levy and collect such assessments upon the stock as will pay those expenses, notwithstanding a by-law of the corporation limiting the amount of the indebtedness they may incur to ten thousand dollars.[4] It is not beyond the power of the trustees of a secret society vested with general power to manage its property, to lease the lodge room to another society for use one night in each week.[5]

§ 131. **Power of officers of a corporation to employ attorneys.**—Attorneys and counsellors may be employed by the managing officers of a corporation without any specific authorization to that effect by formal resolution of the board of directors.[6]

c., 65 Am. Dec. 691.' See, also, Gold Mining Co. *v.* National Bank, 96 U. S. 640; Law *v.* Cross, 1 Black, 533."

[1] Clark *v.* Farmers' Woolen Manufacturing Co., 15 Wend. 256.

[2] Ebaugh *v.* German Reformed Church, 3 E. D. Smith, 60.

[3] Pub. Laws Cal. 1864, 402.

[4] Sullivan *v.* Triunfo Gold & Silver Mining Company, (1866) 29 Cal. 585.

[5] Phillip *v.* Aurora Lodge, No. 104, I. O. G. T., (1882) 87 Ind. 505. See Miller *v.* Chance, 3 Edw. 399, where it was held that a mortgage executed by five of nine chosen trustees might be presumed to have been executed with the concurrence of a majority of the board. Under what circumstances an executive committee appointed by a board of trustees of a manufacturing corporation may make a contract. and their power to draw the money on checks issued in payment under such contract, see Sheridan Electric Light Co. *v.* Chatham National Bank, (1891) 127 N. Y. 517; s. c., 28 N. E. Rep. 467.

[6] Western Bank of Missouri *v.* Gilstrap, (1870) 45 Mo. 419. The Appellate Court of Missouri, in a case where one of the contentions was that no legal authority to prosecute the suit on behalf of the corporation was shown, said: "The law in this state is settled by a course of uniform adjudications that no formal resolution of the board of directors is prerequisite for the employment of counsel for a corporation. Western Bank *v.* Gilstrap, 45 Mo. 419; Southgate *v.* Railroad, 61 Mo. 89; Thompson *v.* School District,

§ 132. When officers may use bonds as collateral.—A manufacturing corporation having been placed in the hands of a receiver in South Carolina, the master having found certain bonds in the hands of creditors to have a priority of lien, and his report having been confirmed, application was made upon the ground of newly-discovered evidence which it was claimed would show that the resolutions of the board of directors authorizing the issue of these bonds did not authorize such use of them as had been made with these particular creditors for an opening and recommitting of the report of the master. Upon the merits of the application the trial judge said it must fail, and gave these reasons: "The purpose with which the bonds in question were issued is declared in the preamble of the resolutions authorizing them to be 'to provide commercial capital for the proper management of the business of the company.' This was to be accomplished by the sale of the bonds or by their use as collaterals. In the course of business it became necessary to raise money to buy cotton and to pay the employees of the mill or to stop. An application was then made to the bank * * * and the resident directors to advance

71 Mo. 495; Holmes *v.* Board of Trade, 81 Mo. 137. In the last case cited Judge Hough says: 'A contract for legal services may be made by the tacit or implied contract of the board of directors,' and in Thompson *v.* School District, *supra*, Judge Sherwood says: 'Of course, if we concede the power, without formal resolution, to employ an attorney, the usual results of such employment will follow as a necessary consequence.' The question in that case was whether the entry of the appearance of the corporation as a party defendant by attorney was duly authorized." President Mining & Milling Co. *v.* Coquard, (1890) 40 Mo. App. 40, 43. Merrill *v.* Consumers' Coal Company, (1889) 114 N. Y. 216, was an action of an attorney against a corporation to recover shares of its stock to which he alleged he was entitled for services for one year under a contract made with its president. It appeared that the corporation had from its organization employed attorneys by the year and paid them in its stock; that the contract had been made by the president, with the approval of the board of directors, and that plaintiff rendered the services called for by his contract with the knowledge of the directors. The New York Court of Appeals held that the evidence was sufficient to warrant a finding that the contract was approved of or acquiesced in by the directors. As to a president's authority or that of other officers to employ counsel, etc., see Potter *v.* New York Infant Asylum, 44 Hun, 367; Insurance Co. *v.* Oakley, 9 Paige, 496; Bank *v.* Bank, 10 Wall. 604; Root *v.* Olcott, 42 Hun, 536; Rider Life Raft Co. *v.* Roach, 97 N. Y. 378; Bridenbecker *v.* Lowell, 32 Barb. 9; Chemical Bank *v.* Kohner, 8 Daly, 530; Bank *v.* Butchers', etc., Bank, 26 How. Pr. 5; Hooker *v.* Eagle Bank, 30 N. Y. 86; Peterson *v.* Mayor, etc., 17 N. Y. 449; Mumford *v.* Hawkins, 5 Denio, 355.

the money needed, and to hold the bonds as collateral security until they could be sold outright. This arrangement was made and the money advanced, and the bonds deposited as collateral security with the bank and the resident directors. This * * * was done with the full knowledge and consent of the board of directors, and the money used to carry on the mill, and all this was done before the bonds were taken by * * * the principal moving creditor." He then refers to certain affidavits made in the case and said: "If true, then there has been no improper or unauthorized use of said bonds, and if they were not pledged by resolution of the directors duly assembled, the company, with their knowledge and approval or gratification [ratification?], have received the benefit of the money advanced on the said bonds, and the transaction, in law or equity, must stand as against the said company and all creditors."[1] The Supreme Court affirmed this judgment, referring to the action of the judge in these words: "There can be no doubt whatever that one of the purposes for which the bonds were issued was to raise money to continue the running of the mills, and there is quite as little that upon application [the creditors whose claims were preferred by the master] did advance largely for that very purpose. Debts were pressing, two of the directors were absent from the state, non-residents, and a majority, the other six, authorized, informally, it may be, these bonds to be held by [them] as collateral security for advances made by them, as was done in the case of other advances, and upon the faith of this transaction the advances were actually made and used to the relief of the company. Under these circumstances it seems to us that the circuit judge did not abuse his judicial discretion in holding [as he did]."[2]

§ 133. **When the execution of a note is not authorized.**— In a Nevada case, where the execution of a note by a president and secretary of a corporation was held to have been unauthorized, the Supreme Court further held that where information of such act was not communicated to the trustees as a board, the trustees could not be held to have ratified the act by reason of the knowledge of a majority thereof acquired while acting as

[1] Hubbard *v.* Camperdown Mills, (1887) 26 S. C. 581, 584; s. c., 2 S. E. Rep. 576.

[2] Citing Ketchum *v.* Duncan, 96 U. S. 659; Claflin *v.* South Carolina R. R. Co., 8 Fed. Rep. 118.

president and secretary; also that the fact that the secretary made out a statement of the debts of the corporation in gross was not sufficient to give the stockholders notice that an unauthorized note was included therein, so that by their inaction they should be held to have ratified it, or to be estopped to deny its validity.[1]

§ 134. **Execution of promissory notes and transfer of choses in action.**— Authority to execute and issue promissory notes of a corporation need not be expressly given to its officers by the by-laws of the corporation or by formal resolution of its board of directors.[2] Such authority may be inferred from the acquiescence of the corporation in or its recognition of the acts of its accredited officers in the regular course of the authorized business of the corporation.[3] A note executed by an agent of a manufacturing corporation will not be presumed to have been authorized by the corporation. To render such a note valid against the corporation the powers of the agent must be shown.[4] The officers of a corporation have no power to authorize the execution of a note as surety for another in respect to a matter having

[1] Edwards *v.* Carson Water Co., (Nev. 1893) 34 Pac. Rep. 381. See, also, Hotchin *v.* Kent, 8 Mich. 527; Dabney *v.* Stevens, 40 How. Pr. 344; Story Ag. § 243; Howell *v.* McCrie, 36 Kans. 652; s. c., 14 Pac. Rep. 257; Combs *v.* Scott, 12 Allen, 496; Mallory *v.* Mallory Wheeler Co., 61 Conn. 141; s. c., 23 Atl. Rep. 708; Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 232; Lyndon Mill Co. *v.* Lyndon Literary & Biblical Inst., 63 Vt. 581; s. c., 22 Atl. Rep. 577; Owings *v.* Hull, 9 Pet. 629; Bohm *v.* Brewery Co., (1890) 16 Daly, 80; s. c., 9 N. Y. Supp. 515; Murray *v.* Lumber Co., 143 Mass. 250; s. c., 9 N. E. Rep. 634; Fitzhugh *v.* Land Co., 81 Tex. 310; s. c., 16 S. W. Rep. 1078; Dedham Institution for Savings *v.* Slack, 6 Cush. 408, 411. The Nevada court in Edwards *v.* Carson Water Co., *supra*, give this as their understanding of the law upon this subject: "That before an individual or corporation can be held to have ratified the unauthorized acts of his or its agents, every detail of the transaction must have been made known to the principal. If, after obtaining such knowledge, the principal fails to act, long and continued silence will be deemed an approval of the act, and such ratification relates back and is equivalent to a prior authority to make the contract." Citing 1 Dan. Neg. Inst. §§ 316–319; Stark Bank *v.* United States Pottery Co., 34 Vt. 144, 146; Story on Agency, § 239; Bank *v.* Jones, 18 Tex. 816; Smith *v.* Tracy, 36 N. Y. 79, 82; French *v.* O'Brien, 52 How. Pr. 394, 398; Combs *v.* Scott, 12 Allen, 493, 497. See, also, Yellow Jacket Silver Mining Co. *v.* Stevenson, 5 Nev. 224, 228; Hillyer *v.* Overman Silver Mining Co., 6 Nev. 51, 55.

[2] First National Bank of Hannibal *v.* North Missouri Coal Co., (1885) 86 Mo. 125.

[3] Ibid.

[4] Benedict *v.* Lansing, 5 Denio, 283; Lawrence *v.* Gebhard, 41 Barb. 575.

no relation to the corporate business, and in which the corporation has no interest.[1] Such a transaction is not within the scope of its business, and a party receiving such note with notice of the circumstances under which it is given cannot recover on it.[2] A corporation may authorize its proper officer to assign a note by delivery.[3] The authority of an agent of a corporation to indorse a note may be shown by other evidence than the by-laws, as for instance, that a president and treasurer of the corporation was in the habit of negotiating notes of the corporation with the sanction of its finance committee.[4] An agent of a corporation may have authority to transfer a note by indorsement but has no authority to bind the corporation as indorser.[5] Express authority from a board of directors of a corporation is not necessary to enable its managing agent, to whom has been intrusted the management of the affairs of the corporation, to assign the choses in action belonging to it to its creditors, either in payment of, or as security for, the payment of a precedent debt.[6] Officers of a corporation, within their general powers, may assign its choses in action in such manner as they may deem expedient.[7] A corporation, it seems, would be bound by an assignment of its dues without recourse by one of its officers intrusted with the collection of its debts upon receiving the amount.[8]

§ 135. **Notes signed by officers of a corporation.**—GILBERT, United States Circuit Judge, in sustaining a demurrer to the defense in an action upon the promissory note of a corporation, that the president and secretary of the corporation had no authority from the corporation, either by by-law or resolution, to execute the note, and that the corporation received no benefit therefrom and did not ratify the same, declared these rules of law upon the questions involved, to wit: "The payee or indorsee of a negotiable promissory note, signed by the officers of a corporation as the note of the corporation, is not required to ascer-

[1] Hall *v.* Auburn Turnpike Company, (1865) 27 Cal. 255.

[2] Ibid.; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309.

[3] Blake *v.* Holley, (1860) 14 Ind. 383.

[4] Brown *v.* Donnell, (1860) 49 Me. 421.

[5] Ibid.

[6] McKiernan *v.* Lenzen, (1880) 59 Cal. 61; Gillett *v.* Campbell, 1 Denio, 522; Carey *v.* Giles, 10 Ga. 10; Phillips *v.* Campbell, 43 N. Y. 271.

[7] Blake *v.* Holley, (1860) 14 Ind. 383.

[8] Ætna Insurance Co. *v.* Wires, 28 Vt. 93.

tain whether the officers have authority to make the note. A corporation formed under the General Incorporation Laws for the purpose of conducting business has, so far as the law is concerned, the same power that an individual has to contract debts whenever necessary, or convenient in furtherance of its legitimate objects. It may borrow money to pay its debts. It may execute notes, bonds and bills of exchange. The power to sign such paper may be conferred upon any officer. If the president and secretary sign, their authority is inferred from their official relation. All persons dealing with them have the right to assume that there is no restriction of that authority. They also have the right to assume, unless they have actual notice to the contrary, that a note so signed is made in the regular course of the business of the corporation. To hold otherwise would destroy the negotiability of all notes made by corporations."[1]

§ 136. **Power of bank officers.**— It is not sufficient to establish the official character of a person to designate him as an officer. There must be competent and official proof of his authority to act in an official capacity. Therefore, the assignment and acknowledgment of a judgment, purporting to have been made by a bank, in the absence of proof of the authority of the persons executing the assignment in the name of the bank, were held not sufficient to establish the fact of the assignment.[2] An assignment of the assets of a banking corporation under a resolution of its directory, for a purpose within the scope of their powers, is *prima facie* valid.[3] The settlement of a defalcation to a bank, and the acceptance of a deed of real estate in satisfaction and release, are not transactions which fall within the ordinary powers of a corporation which may be exercised by its agents or persons who are held out to the public as such. Power to do such acts must be conferred by the board of directors.[4] The president of the directory of a banking corporation cannot use its cash or credits,

1 American Exchange National Bank *v.* Oregon Pottery Co., (1892) 55 Fed. Rep. 265; citing Merchants' Bank *v.* State Bank, 10 Wall. 644; Crowley *v.* Mining Co., 55 Cal. 273; 1 Dan. Neg. Inst. § 381.

2 Klemme *v.* McLay, (1885) 68 Iowa, 158; s. c., 26 N. W. Rep. 53.

3 Gibson *v.* Goldthwaite, (1845) 7 Ala. 281.

4 Bank of Healdsburg *v.* Bailhache, (1884) 65 Cal. 327; Gashwiler *v.* Willis, 33 Cal. 11; Blen *v.* Bear River Co., 20 Cal. 602.

etc., for the purpose of settling the demands of its creditors, in the absence of authority conferred by its charter, by-laws or resolution of the directory within their power to adopt.[1] And the affixing of the seal of the corporation to an unauthorized transfer by its president of its assets cannot impart validity to the transfer.[2] The officers of a national bank, without express authority from its shareholders, after the bank goes into liquidation, can only bind them by acts implied by the duty of liquidation.[3] General authority, unrestricted by rules or by-laws, given to the president and cashier of a bank to manage and control all of its financial affairs, does not authorize them to use the property of the bank for private purposes of their own, or for the benefit of themselves; therefore, they cannot bind the bank by a contract to which they, or either of them, are parties.[4]

§ 137. **Power of a bank cashier.**— A cashier of a bank has no authority, by virtue of his office, to represent the bank at a meeting of the creditors of an insolvent, and to vote for syndic. A resolution of the board of directors can alone empower him to do so.[5] The cashier of a bank is held out to the world as its

[1] Gibson *v.* Goldthwaite, (1845) 7 Ala. 281. See Hallowell & Augusta Bank *v.* Hamlin, 14 Mass. 180.

[2] Gibson *v.* Goldthwaite, (1845) 7 Ala. 281. In Cross *v.* Anglo-American Banking Co., (1894) 79 Hun, 424; s. c., 29 N. Y. Supp. 960; 61 N. Y. St. Repr. 270, the president and chief executive of a foreign banking corporation having its principal place of business in the city of New York, being authorized by its articles of incorporation and by the action of its directors to open its office in that city, was held presumptively to have authority to purchase the furniture necessary to equip the office of the corporation, there being no by-law of the corporation or resolution of the directors limiting his power, or requiring that no expenditures should be made except under a resolution of the board of directors. In First National Bank of Whitehall *v.* Tisdale, (1881) 84 N. Y. 655, it was held to be beyond the power of a president of a national banking association to bind the association by an agreement to hold, without collecting, a note which had been indorsed to it at the president's request, for the purpose of increasing the bank's assets and enabling it to pass an expected examination of the inspector.

[3] Richmond *v.* Irons, (1887) 121 U. S. 27; s. c., 7 Sup. Ct. Rep. 788. In Schrader *v.* Manufacturers' National Bank of Chicago, (1890) 133 U. S. 67; s. c., 10 Sup. Ct. Rep. 238, it was held that the rights of the shareholders could not be affected by the acts of the president, done after the bank had gone into liquidation.

[4] Rhodes *v.* Webb, 24 Minn. 292.

[5] Reed *v.* Powell, (1845) 11 Rob. (La.) 98. The court said: "The directors are the general agents and administrators of the corporation, and by the charter are empowered to appoint such officers and sub-agents as may be necessary for the transac-

executive officer intrusted with its notes and bills, and the collection and transfer of them in the ordinary course of its business. And in case of promissory notes held by banks an indorsement by the cashier of the bank, in his official character, is sufficient, at least *prima facie* to pass the title of the bank thereto.[1] The cashier of a bank, in the course of his ordinary duties and by virtue of the general power appertaining to his office, has a right to transfer the paper securities of the bank, in payment of its debts.[2]

tion of its business. The powers and duties of these officers are defined by the charter and by-laws of the bank. Within the sphere of their respective duties they represent the corporation, and bind it by their acts; but in all matters and things not properly belonging to their office they cannot represent or act for the corporation unless specially or generally authorized so to do by a resolution of the board. Thus, the cashier, who is intrusted with the transaction of the banking business of the corporation, needs no special authority to do and perform any act required for the proper management and dispatch of the same; but when it becomes necessary for the corporation to appoint an agent for any particular purpose, or to do any other thing not properly belonging to the duties of his office, he has no better right to act than any other person. To say that he can make such an appointment, or do any other act on behalf of the corporation, because it is a mere act of administration, would be to make the cashier its general agent and administrator, instead of the board of directors." See, also, Union Bank *v.* Bagley, 10 Rob. (La.) 43; Clinton Company *v.* Kernan, 10 Rob. (La.) 176; Union Bank *v.* Jones, 4 La. Ann. 236.

[1] Haynes, Liquidator, *v.* Succession of Beckman, (1851) 6 La. Ann. 224; Fleckner *v.* United States Bank, 8 Wheat. 360; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505, 507; Merchants' Insurance Co. *v.* Chauvin, 8 Rob. (La.) 49.

[2] Everett *v.* United States, (1837) 6 Port. (Ala.) 166. The court quoted the language of Mr. Justice STORY in Fleckner *v.* United States Bank, 8 Wheat. 358, as clearly recognizing the right of the cashier as stated in the text. That language was as follows: "The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, etc., to be used from time to time, for the ordinary and extraordinary exigencies of the bank. He receives directly or through the subordinate officers, all moneys and notes. He delivers up all discounted notes and other property, when payments have been duly made. He draws checks from time to time, for moneys, whenever the bank has deposits. In short, he is considered the executive officer, through whom, and by whom, the whole moneyed operations of the bank, in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds, as the moneyed capital of the bank, to discharge its debts and obligations." The cashier of a bank has no authority to pay a depositor in notes belonging to the bank by transferring them to him. Schneitman *v.* Noble, (1888) 75 Iowa, 120.

§ 138. When the authority of its cashier cannot be questioned by a bank.— Under the facts disclosed in a case before the United States Supreme Court, it was held by the court that the binding force of an agreement made by the cashier of the bank, in reference to the indebtedness of one of the debtors of the bank, including the cancellation of the debtor's old notes and trust deeds made by him to secure them and the acceptance of new ones could not be disputed by the bank.[1]

[1] Martin *v.* Webb, (1884) 110 U. S. 7. The ruling was based upon the principles stated by Mr. Justice HARLAN, speaking for the court, in these words: "It is quite true * * * that a cashier of a bank has no power by virtue of his office, to bind the corporation except in the discharge of his ordinary duties, and that the ordinary business of a bank does not comprehend a contract made by a cashier — without delegation of power by the board of directors — involving the payment of money not loaned by the bank in the customary way. United States Bank *v.* Dunn, 6 Pet. 51; United States *v.* City Bank of Columbus, 21 How. 356; Merchants' Bank *v.* State Bank, 10 Wall. 604. Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets and securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned — certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the order and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier — at least where its charter does not otherwise provide — in transactions outside of his ordinary duties, without his authority to do so being in writing or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known

§ 139. Indorsement of a draft by cashier and president.—An English corporation, a mortgage company, by its managers in an American city, drew drafts upon its home office in London and applied to a local bank to have them discounted. The latter signified that they would discount the drafts if they were indorsed by another local bank. This was done by the cashier and the president of the latter. Finally, one of these drafts was not paid at the home office of the corporation, and the discounting bank brought its action against the receiver of the other local bank upon the indorsement of the officers of that bank. The United States Circuit Court held that there could be no recovery.[1]

in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

[1] National Bank of Commerce of Kansas City *v.* Atkinson, (1893) 55 Fed. Rep. 465. The court thus states the contentions: "The defendant contends: First. That [the cashier] had no authority to place the indorsement of the [bank] upon those drafts, or either of them, and that * * * the president had no authority whatever to place the indorsement of the [bank] upon the first note, which was given after the drafts were protested, or any note representing these drafts. Second. That the indorsement, at most, was a loaning of the bank's credit, or, in other words, an accommodation indorsement, which the bank had no power to make." Then the question was discussed and the law stated as follows: "There is no doubt but what the law is that a national bank cannot loan its credit or become an accommodation indorser. On that question the decisions are uniform. It is also true that the president of a bank has no power inherent in his office to bind the bank by the execution of a note in its name, yet the power to do so may be conferred upon him by the board of directors, either expressly, by resolution to that effect, by subsequent ratification, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge. In other words, I think it must be held that banks are liable for the acts of their officers, especially executive officers and general agents, within the general scope and apparent sphere of their duties; but that they are not liable for the acts of their officers done without special authority, in cases which are not within the general scope and sphere of their duties as such officers. The responsibility of a bank (in the absence of express authority to do a particular act) is limited to the acts of its officers and agents, performed in the discharge of their ordinary duties in the usual course of business and within the sphere and scope of such duties. Acts within the ordinary sphere and scope of their business are presumed to be by authority and within the knowledge of the directors. That there was no express authority given by the board of directors, by resolution or otherwise, either to * * * the cashier or to * * * the president, to indorse the drafts and notes, is conceded. Neither was there any formal ratification of their action by the directors or officers of the bank. Indeed, none of them had any knowledge whatever of the transactions ex-

§ 140. Power of a treasurer of a savings bank.—The treasurer of a savings bank is not *virtute officii* clothed with power to borrow money for the institution and to pledge its securities as collateral.[1] The treasurer of a savings bank has no authority, *ex officio*, to release a debt due the bank, upon payment of a dividend by the debtor.[2] A vote of a savings bank corporation to sell notes held by it would not confer authority upon its treasurer to bind the bank by indorsing its name on a promissory note held by it, and he has no such authority *ex officio*.[3] A provision in the by-laws of such an institution that the treasurer "shall draw all necessary papers and discharge all obligations of the corporation, and his signature shall be binding on the corporation," has been held to mean the signature of the treasurer to necessary papers and in discharge of obligations to the corporation, and not to authorize him to bind the corporation by such an indorsement on a promissory note.[4] The title passes by an assignment of a

cept [these two officers]." The court then considered the facts upon the question of whether the bank retained and enjoyed the proceeds of these transactions, and thereby became liable by reason of its indorsement appearing upon those papers. In the course of the opinion it is said: "It is shown by the record beyond all question that the [bank] never received any benefit whatever, by way of discount or otherwise, out of the transactions in relation to these drafts, or either of them." And further on: "The [bank] never received any benefit from discounts or otherwise on these drafts. The renewal drafts and the notes were not placed upon the books of the [bank]. When the drafts were protested, the [bank] was not notified of the protest, but, on the contrary, the mortgage company only received notice of their dishonor. The notes were all indorsed in the office of the [plaintiff bank] by * * * the president [of the bank of which defendant is receiver], and away from the place of business of [this bank], and no mention of them was made upon its books. The directors of the bank did not know of their existence, and could not have ascertained their existence from an examination of the books or accounts of the bank. Such a transaction, it seems to me, cannot be said to be in the usual course of business, or within the implied powers of the president of a bank. My attention is especially called to the case of People's Bank *v.* National Bank, 101 U. S. 181. That was a case upon a guaranty. The papers passed through the bank in the regular course of business. The bank received the benefit of the transaction, and the officer of the bank was acting strictly within the scope of his authority as an officer of the bank. The facts in that case are different from the facts in the case at bar, and the decision, in my judgment, does not aid the plaintiff."

[1] Fifth Ward Savings Bank *v.* First National Bank, 19 Vr. (N. J.) 513.

[2] Dedham Savings Institution *v.* Slack, (1850) 6 Cush. 408.

[3] Bradlee *v.* Warren Savings Bank, (1879) 127 Mass. 107.

[4] Ibid.

mortgage in the name of a savings bank, executed by its treasurer who has authority to execute it, and his indorsement of the note to a *bona fide* holder, though he may in his action perpetrate a fraud upon the bank and convert the purchase money to his own use.[1]

§ 141. **Power of officers of mining corporations.**—It may be assumed by persons dealing with mining superintendents or general agents in charge of mines, in the absence of notice to the contrary, that their authority covers all the ordinary local business of a mining corporation.[2] The purchase of timber for a mining corporation is within the power of its general agent.[3] But such a general agent of a mining corporation, unless specially empowered so to do, has no authority to make promissory notes in the corporation's name.[4] The secretary of a mining corporation has no authority, by virtue of his office, to make assignment of the promissory notes belonging to the corporation. Such an assignment of notes by a secretary is not a corporate act unless it is shown that the secretary was not only authorized to make the transfer, but to make it in his official capacity.[5] The superintendent of a mining corporation, instructed by letters and otherwise from the officers of the corporation not to contract any debts, but merely to expend such money as might be furnished him, cannot bind the corporation by a promissory note.[6] There is,

[1] Whiting *v.* Wellington, 10 Fed. Rep. 810.

[2] Adams Mining Co. *v.* Senter, (1872) 26 Mich. 73.

[3] Ibid.

[4] New York Iron Mine *v.* Negaunee Bank, 39 Mich. 644.

[5] Blood *v.* Marcuse, (1869) 38 Cal. 590. For the same principles upon which this assignment was held to be void as not being a corporate act, see Gashwiler *v.* Willis, 33 Cal. 11; Marine Bank *v.* Clements, 3 Bosw. 600; Johnson *v.* Bush, 3 Barb. Ch. 207; Brown *v.* Weymouth, 36 Me. 415; Barcus *v.* Hannibal, Ralls County & P. P. R. Co., 26 Mo. 102; Mt. Sterling & Jeffersonville T. R. Co. *v.* Looney, 1 Metc. (Ky.) 550; Walworth County Bank *v.* Farmers' Loan & Trust Co., 14 Wis. 325; Hallowell & Augusta Bank *v.* Hamlin, 14 Mass. 180; Hoyt *v.* Thompson, 1 Seld. 320; Whitwell *v.* Warner, 20 Vt. 425.

[6] Carpenter *v.* Biggs, (1873) 46 Cal. 91. In New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344; s. c., 6 N. W. Rep. 823, it was held that there was no presumption of authority of an agent of the mining corporation to draw post-dated bills of exchange on his principal from his having done so before without objection, there being nothing to show that the party relying on his authority knew the fact, and a long interval having passed since it occurred, and the corporation having meanwhile become prosperous and being better supplied with ready money; and it also appearing that the post-

presumably, power in such an agent and manager of a mining corporation power to sell its personal property.[1]

§ 142. General rules as to the power of a president.— The powers of a president of a corporation over its business and property are strictly the powers of an agent.[2] A corporation will not be bound by the contract of its president, without proof of his agency.[3] The same evidence from which authority to bind would be inferred in other cases, must determine the authority of the president of the corporation to bind it by a contract entered into on its behalf.[4] It is necessary to show that an agreement of the president of a corporation is within the scope of his authority to make it evidence.[5] A corporation which, by its charter, can only act through its board of directors, cannot be bound by contracts entered into by its president, without the authorization of the board, except in acts of simple administration, which, of necessity, should be done without authorization.[6] A corporation cannot be bound by a contract made by its president, except it be shown that power to make it was given him by the act of incorporation, or that he was authorized by the corporation to make it, or that there was a subsequent ratification of the contract.[7] The power to sell and assign the securities of a corporation without authority from the trustees, is not included in the authority of its treasurer to collect and pay debts.[8] Acts of the corporation, or

dated bills he had formerly drawn were drawn on time and post-dated only long enough to give the drawer the benefit of the full period of discount after receiving them, while in this case they were made payable at sight and post-dated several weeks for the agent's private advantage.

[1] Scudder *v.* Anderson, 54 Mich. 122; s. c., 19 N. W. Rep. 775.

[2] State Bank *v.* Holcomb, 2 Hals. (N. J.) 196.

[3] Fisher *v.* Gas Co., 1 Pears. (Pa.) 118; Jackson *v.* Market Co., 12 W. N. C. (Pa.) 190.

[4] Lee *v.* Pittsburgh Coal & Mining Co., 56 How. Pr. 373; s. c., 75 N. Y. 601.

[5] Farmers' Bank *v.* McKee, 2 Pa. St. 318.

[6] Bright *v.* Metairie Cemetery Association, 33 La. Ann. 58.

[7] Mount Sterling & Jeffersonville Turnpike Road Co. *v.* Looney, (1858) 1 Metc. (Ky.) 550.

[8] Jackson *v.* Campbell, 5 Wend. 572. In Williams *v.* Uncompahgre Canal Co., (1889) 13 Colo. 469; s. c., 22 Pac. Rep. 806, it was held that where a contract under seal had been executed by the officers of a corporation in their individual names it was competent to aver and prove by parol that the corporation, as the real party in interest, adopted, ratified and undertook to carry out the terms of the contract in such a manner as to become bound thereby. Cases as to the lack of a president's power, unless it be specially conferred by the managing board:

acts of an authorized agent within the scope of his authority, from which the promise may be implied, must be shown to bind a corporation by an implied promise.[1] It is not in the power of the president of a corporation to borrow money in the name of the corporation and pledge its responsibility, without authority conferred by the charter or by-law of the corporation, or a resolution of the directors.[2] Under a by-law of a corporation giving the president "the general charge and direction of the business of the company, as well as all matters connected with the interests of the corporation," he has no authority to do an act which, by another by-law of the corporation, is expressly given to a separate committee.[3] A president cannot borrow money on his own note and bind the corporation for the loan by falsely representing that he wishes the money for his corporation.[4] The president of a corporation, having full personal charge of the business which the corporation was organized to transact, represents the corporation, and, *prima facie*, has power to do any act which the directors can authorize or ratify.[5] Unless authorized by the charter or by-laws of a corporation, its president has no authority to indorse and negotiate notes which are its property. But his authority to do so may be presumed from his uniform practice in such mat-

Holbrook *v.* Fauquier, etc., Turnpike Company, 3 Cranch C. Ct., 425; Wait *v.* Nashua Armory Assn., (N. H.) 23 Atl. Rep. 77; s. c., 34 Cent. L. J. 119; 14 Law Rep. Anno. 356; Mt. Sterling, etc., Turnpike Road Co. *v.* Looney, 1 Metc. (Ky.) 550; s. c., 71 Am. Dec. 491; Bacon *v.* Mississippi Insurance Co., 31 Miss. 116; Walworth County Bank *v.* Farmers' Loan & Trust Co., 14 Wis. 325; Titus *v.* Cairo, etc., R. R. Co., 37 N. J. Law, 98; Dawes *v.* North River Insurance Co., 7 Cowen, 462; Mahone *v.* Manchester, etc., R. R. Corp., 111 Mass. 72; s. c., 15 Am. Rep. 9; Marine Bank *v.* Clements, 3 Bosw. 600; Lyndon Mil. Co. *v.* Lyndon Literary & Biblical Inst., 63 Vt. 581; s. c., 22 Atl. Rep. 575; 25 Am. St. Rep. 783; Westerfield *v.* Radde, 7 Daly, 326; Western R. R. Co. *v.* Bayne, 11 Hun, 166; Hodge *v.* First National Bank, 22 Gratt. 51; Brooklyn Gravel Road Co. *v.* Slaughter, 33 Ind. 185; First National Bank *v.* Kimberlands, 16 W. Va. 555. That the power of a president in making contracts on behalf of a corporation is restricted to the authority being conferred on him by the corporation, see Bacon *v.* Mississippi Ins. Co., 31 Miss. 116.

[1] Mount Sterling & Jeffersonville Turnpike Road Co. *v.* Looney, (1858) 1 Metc. (Ky.) 550.

[2] Life & Fire Insurance Co. *v.* Mechanics' Fire Ins. Co., 7 Wend. 31.

[3] Market Co. *v.* Jackson, 102 Pa. St. 269.

[4] Wright's Appeal, (1882) 99 Pa. St. 425; citing Angell & Ames on Corp. §§ 220–297; Martin *v.* Great Falls Manufacturing Co., 9 N. H. 51.

[5] Oakes *v.* Cattaraugus Water Co., (1894) 143 N. Y. 430; s. c., 38 N. E. Rep. 461; 62 N. Y. St. Repr. 445;

ters.[1] Under authority given him by the directors of a banking corporation to sell certain stock belonging to it, the president of the bank, where uninstructed to the contrary, would have authority to employ a broker to sell it.[2] The acts of clerks of a corporation in making unauthorized purchases for the corporation on credit may be ratified by its president.[3] By virtue of his office, a president of a corporation may collect subscriptions to the capital stock.[4] In a Missouri case a corporation, a transfer company, was held liable upon promissory notes, given for the purchase of mules for its use, and signed in its name by its president.[5]

Hastings *v.* Brooklyn Life Ins. Co., 138 N. Y. 473; s. c., 34 N. E. Rep. 289; Conover *v.* Insurance Co., 1 N. Y. 290; Booth *v.* F. & M. N. Bank, 50 N. Y. 396; Leslie *v.* Lorillard, 110 N. Y. 519; s. c., 18 N. E. Rep. 363; Holmes, Booth & Haydens *v.* Willard, 125 N. Y. 75; s. c., 25 N. E. Rep. 1083; Patterson *v.* Robinson, 116 N. Y. 193; s. c., 22 N. E. Rep. 372; Rathbun *v.* Snow, 123 N. Y. 343; s. c., 25 N. E. Rep. 379; New York P. & B. R. R. Co. *v.* Dixon, 114 N. Y. 80; s. c., 21 N. E. Rep. 110.

[1] Marine Bank *v.* Clements, 6 Bosw. 166.

[2] Sistare *v.* Best, 16 Hun, 611.

[3] Silva *v.* Metropolitan Drug Co., 42 N. Y. Super. Ct. 307. In Brouwer *v.* Harbeck, 1 Duer, 114, an insurance company was authorized by its charter to receive premium notes in advance and negotiate them to raise money for the payment of losses or otherwise in the course of its business. The president of the corporation was empowered by its by-laws to sign policies and transact the ordinary business of the corporation. It was held that the borrowing of money and hypothecation of these premium notes for the purpose of paying losses, and afterwards having these notes discounted by the lender in payment of the loss, was in the transaction of the ordinary business of the corporation, and did not require a previous resolution of the board of directors.

[4] East New York, etc., R. R. Co. *v.* Lighthall, 5 Abb. Pr. (N. S.) 458; s. c., 36 How. Pr. 481; 6 Robt. 407. In Georgia Company *v.* Castleberry, (1871) 43 Ga. 187, where the corporation was of the same name with a partnership doing business by the same agent before the date of the charter, it was held that the assumption of a debt due by the old partnership with no new consideration was outside of the scope of the charter, and, therefore, outside of the scope of the president's duties, as they were derived from the nature of his office, and even a written contract promising to pay this debt would be of doubtful validity unless there was special authority from the company.

[5] Sparks *v.* Dispatch Transfer Co., (1891) 104 Mo. 531; s. c., 15 S. W. Rep. 417; 24 Am. St. Rep. 351; 12 Law Rep. Anno. 714; 33 Am. & Eng. Corp. Cas. 373. "The power of [the president] to bind [the corporation]," said the Supreme Court of that state, "is governed by the law of agency. The principle underlying is the same, whether the principal be a corporation or an individual. It is now well settled that when, in the usual course of the business of a corporation, an officer

§ 143. Rule as to evidence in such cases.— In the Missouri case just referred to, some of the promissory notes, with which it was sought to charge the corporation, were signed by its president as an individual. The Supreme Court of Missouri held that where such negotiable notes are signed by the president of a corporation in his own name, and nothing appears in the instrument to indicate he was acting as agent of the corporation, extrinsic evidence was inadmissible to show such agency.[1] In a late New

has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. This is only the application of the principle that usual employment is evidence of the powers of an agent, and the principal is held responsible for the acts of his agent within the apparent authority conferred on the agent. First National Bank *v.* North Missouri, etc., Co., 86 Mo. 125; Washington Mut. Fire Ins. Co. *v.* Seminary, 52 Mo. 480; Kiley *v.* Forsee, 57 Mo. 390; Martin *v.* Webb, 110 U. S. 7; Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192. The president of a business corporation is its chief executive officer. He may, without any special authority from the board of directors, perform all acts of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. Boone on Corp. § 144; Stokes *v.* Pottery Co., 46 N. J. Law, 237." Applying the principles to the case at bar, it was said: "[The president of the company] purchased every mule that [the corporation] owned from its organization until after the execution of the notes sued on in this case. He had repeatedly signed notes in the name of the corporation, and the corporation had honored his orders and paid his notes so drawn. Plaintiffs had thirteen different transactions with him as the president and purchasing agent of the [corporation] prior to the giving of the notes herein, and his acts had always been ratified. The [corporation] was engaged in a transfer business, in which the motive power was mules, and it was its written charter privilege to buy mules and execute its notes therefor. [The president] had purchased mules for the [corporation] of the plaintiffs, and on this occasion he informed them he was purchasing the mules for which these two notes were given for the [corporation]. His transaction, under the evidence, was within both his actual and apparent authority to bind the [corporation]."

[1] Sparks *v.* Dispatch Transfer Co., (1891) 104 Mo. 551; s. c., 15 S. W. Rep. 417. The court reviewed a number of cases from other states sustaining this view, and then, as it was claimed that this doctrine had been repudiated by the courts of Missouri in certain cases, these latter were reviewed and distinguished as follows: "The leading case relied upon by respondents is Washington, etc., Ins. Co. *v.* Seminary, 52 Mo. 480. The note which was the basis of the action in that case was as follows:

'$750.

'For value received in policy number 2,969, dated the fourteenth day of March, 1866, issued by the Washington Mutual Fire Insurance Company of St. Louis, I promise to pay said company (or their secretary for the time being) the sum of $750, in such

York case there was a contention that although the corporation might be legally liable for the debt, still the notes in the first instance having been made and discounted for the accommodation of Woodruff (its president), the debt was not contracted in the business for which the corporation was created, and the mort-

portions and at such time or times as the directors of said company may, agreeably to their acts of incorporation, require.

'[Signed] DANIEL McCARTHY,
'*President.*
'Per THOMAS BURKE.'

"This court held that it was competent to explain the ambiguity on the face of the note itself. Speaking for the court, Judge SHERWOOD said in that case: 'In the present case, the note sued on is signed 'Daniel McCarthy, President.' But president of what? Just here, under the rules laid down in the above cases, parol evidence steps in and affords a ready and satisfactory explanation. The word 'president,' attached to the name of Daniel McCarthy, is an earmark of the official capacity in which the note was signed — not evidence, it is true, that the note was signed in that capacity, but a sufficient basis for the introduction of testimony tending to establish that fact.' The court resumed: 'Moreover, in that case the note on its face referred to policy number 2,969, which insured the seminary building and church building belonging to St. Mary's Seminary. It will be observed, *first*, that the above note is *not negotiable*, and, *secondly*, that the ambiguity appears on its face, growing out of the word 'president,' affixed to McCarthy's name. In the case at bar the notes are, by their terms, *negotiable*, and contain nothing but Jackson's name as maker; so that this case is not authority, because the facts are entirely different.' It is true, however, that, in this case, Judge SHERWOOD quotes from the decision in Mechanics' Bank of Alexandria *v.* Bank, 5 Wheaton, 327, in which the Supreme Court of the United States says: 'It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency.' If this were all, it must be conceded that respondents are justified in claiming that this decision is broad enough to permit parol evidence in any case to explain who was the principal, notwithstanding there is no intimation on the face of the paper that any one but the agent is a party to it. But the Supreme Court of the United States did not put their decision on that ground; but, on the contrary, Justice JOHNSON, who delivered the opinion, expressly says: 'But the fact that this appeared *on its face* to be a private check is by no means to be conceded; on the contrary, the *appearance* of the *corporate* name of the institution *on the face of the paper* at once leads to the belief that it is a *corporate*, and not an individual, transaction; to which must be added that the cashier is the drawer, and the teller the payee, and the form of ordinary *checks* deviated from by the substitution of 'to order' for 'to bearer.' The *evidence*, therefore, on the *face* of the bill predominates in favor of its being a bank transaction. But it is *enough* for the purposes of a defendant to establish that there *existed* on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other, and in such a case to resort to extrinsic evi-

gage could not, therefore, be enforced for its payment. The court held that the refusal to find that these notes were made and discounted for the accommodation of the president individually, and that the debt was not contracted in the business for which the company was created, was justified by the evidence.[1]

dence to remove the doubt.' So that it seems clear that the Supreme Court placed its decision upon the fact that, upon the face of the paper the ambiguity appeared. That court would never have held that there was any ambiguity on the face of the notes sued on [there]. Falk *v.* Moebs, 127 U. S. 597. In 31 Mo. 193 (Smith *v.* Alexander), the action was on the following note:

'$500. St. Louis, Mo., *July* 22, 1855.

'Ninety days after date I promise to pay to the order of Messrs. Smith & Co., $500, for value received, negotiable and payable without defalcation or discount.

'[Signed] J. H. ALEXANDER,

'*Treasurer, Ohio & Miss. R. R. Co.*'

"In that case Alexander, having been sued on this note, was allowed to show that he was treasurer of the Ohio railroad, and that he gave the note simply as agent of said company, Judge Ewing saying: 'A mere addition to the name of the party signing the contract cannot be regarded as a certain *indicium* that it was made on behalf of another. When, however, it is *doubtful from the face* of the contract whether it was intended to operate as a personal engagement of the party signing it, or to impose an obligation on some third person as principal, evidence is admissible to show the character of the transaction.' So we see that Judge Ewing placed his ruling on the *doubt* appearing on the face of the note whether it was the obligation of Alexander or the railroad company."

[1] Martin *v.* Niagara Falls Paper Manufg. Co., (1890) 122 N. Y. 165; s. c., 25 N. E. Rep. 303, affirming 44 Hun, 130. The court said: "The burden of proving that the notes were not given in the business of the corporation rested upon the defendant. [The plaintiff], the president of the bank, testified that he had no knowledge of the proceeds being used for Woodruff's benefit, and the facts of the case do not bring it within the rule which puts upon a holder of a promissory note or other corporate obligation the burden of proving by direct evidence that it was issued pursuant to a vote of the trustees, or for a corporate debt, or that the corporation received the consideration, in order to establish a corporate liability. The cases where this rule has been held are those of special agency. The general rule, of course, is that the agent's authority in all cases must be shown to charge the principal with an act performed by the agent, but in many instances this fact may be established by presumptive evidence. And this is so where the corporation, whose obligation is in question, is engaged in a business, the nature of which and the duties in relation to which devolved upon its officers, require or justify the giving of negotiable instruments without being authorized thereto by a special vote to that effect. If the scope of the agent's authority be proven and it appears that acts like the one in question would, under ordinary circumstances, be within the authority, a presumption arises that the necessary circumstances did exist and that the act in question was authorized. Morawetz on Corp. § 616; Lincoln *v.* Iron Co., 103 U. S. 412;

§ 144. Power of president as to transfer of assets.—There is no power in a president and general manager of a corporation, as such, to borrow money for the corporation and to assign the assets of the corporation as a security for the loan,[1] but in accordance with the uniform practice of a corporation, its president may transfer the title to a promissory note by an indorsement signed by him as president.[2] The presumption that the president of a corporation had power to execute it, is carried with an assignment of a claim owned by the corporation exe-

Patterson *v.* Robinson, 116 N. Y. 193; F. & M. Bank *v.* B. & D. Bank, 16 N. Y. 125; N. R. Bank *v.* Aymar, 3 Hill, 262. It was said in Farmers' Bank *v.* Butchers & Drovers' Bank that the sound rule is that 'when a party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representations of the agent as to any extrinsic fact which rests particularly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done.' The court then said: 'The case is analogous to the giving of a firm note by one partner for his own benefit. When such a note is given in a transaction unconnected with the partnership business and known to be so by the person taking it, the other partners are not bound without their consent, but, *prima facie*, the firm note binds all the partners, and the burden of proving a want of authority lies upon the firm. Doty *v.* Bates, 11 Johns. 544; Gansevoort *v.* Williams, 14 Wend. 133–138.' The nature of the business of the paper company justified the giving of negotiable paper, and the making of such instruments was an incident to the business it carried on. It was a frequent occurrence in the management of its affairs. The by-laws which required the secretary to sign all obligations of the company had never had any force and were unknown to the bank. What the bank did know was that Woodruff [who made the notes] was president, general manager and financial agent of the company. He was such by the general acquiescence of the stockholders. He and * * * daughter owned the stock of the company. For twenty-five years there had been no meeting of the stockholders for the election of officers and very few meetings of the trustees, and Woodruff had managed the business as if it was his own. He bought its supplies, sold its products and paid its debts. No other person was shown to have had a voice in the management of its affairs. Under such circumstances, the giving of a promissory note in the name of the company for money borrowed was not only within the apparent scope of Woodruff's authority, but the long period during which, without interference, he was permitted to manage the company's affairs, justified the inference that it was within his actual authority. Martin *v.* Webb, 110 U. S. 7. The bank was, therefore, justified in relying upon the presumption that the notes, being made in the name of the company, were given in its business and for its benefit."

[1] Hyde *v.* Larkin, (1889) 35 Mo. App. 365.

[2] Scott *v.* Johnson, 5 Bosw. 213; Merchants' Bank *v.* McColl, 6 Bosw. 473.

cuted by its president under its corporate seal, reciting an authority from the board of directors to execute it.[1] When the transfer of a note belonging to a corporation has been authorized by a resolution of its board of directors, its president has power to indorse it over.[2] As against the parties to a note, the presumption is that the president of a corporation indorsing it over was authorized to do so.[3] The president of a corporation may be authorized to indorse its notes by the directors, who with the president by the charter have full power to conduct its affairs.[4]

§ 145. **When a president's act is binding.**— A manufacturing corporation of Connecticut, for the purpose of manufacturing a certain class of goods and to prepare for the same, arranged with a New York firm of commission merchants that the latter advance to the corporation, as called for, money to the amount of $100,000, to be secured by a mortgage upon its real property and its personal property to this extent, that the goods manufactured of this kind would be shipped to the firm to be sold on commission and the avails of the sales applied to the settlement of the bond and mortgage. Advances were made to an amount slightly exceeding the amount of the limit; goods were shipped and sold on commission, etc. The president of the corporation, its principal business and financial manager, requested this firm to make advancements to the corporation in addition to those contemplated and secured by mortgages, and verbally agreed that these should be secured by the mortgages, by the products of the mill previously and subsequently consigned to them, and certain shares of stock which the corporation held in pledge. There was advanced upon the agreement a large sum of money in addition to that already advanced. There was no vote either of stockholders or directors authorizing such borrowing or agreement. In an action for foreclosure of the mortgage the Supreme Court of Connecticut held that the firm was entitled to a decree of foreclosure and sustained the right of the firm to apply, as it had done, the proceeds of the sale of products of the corporation to the later

[1] Corbit *v.* Nicoll, 12 N. Y. Civ. Pro. 235.

[2] Clark *v.* Titcomb, 42 Barb. 122

[3] Elwell *v.* Dodge, 33 Barb. 336.

[4] Merrick *v.* Trustees of the Bank of the Metropolis, 8 Gill. (Md.) 64. As to president's power to draw, accept, and indorse bills of exchange, see Jones *v.* Hawkins, 17 Ind. 550; Allison *v.* Hubbell, 17 Ind. 559.

advances made under this arrangement with the president instead of upon the bond which the mortgage was executed to secure.[1]

§ 146. **Illustrations of the power of a president.**— The contracts binding a corporation which the president thereof has authority to make, by virtue merely of his official position, are confined to those relating to matters arising in the ordinary course

[1] Lewis *v.* Hartford Silk Manufacturing Co., (1887) 56 Conn. 25. In its opinion as to the binding effect upon the corporation of the transactions of its president the court said: "No vote [of stockholders or directors] was necessary to make the acts of [the president] binding upon the corporation. Having made him its principal and general financial manager and agent, with no limitation upon his power, and having notified all persons concerned of such appointment, the company is bound by his act of borrowing for its benefit and of pledging [the products of the mill] or any other personal property for repayment. He was clothed with power to borrow money for its necessary and proper uses from any person who would lend; to sell [their products] and repay; or consign [them] with leave to retain the proceeds; or use any other property for that purpose. And as in these matters, in legal contemplation, he was the corporation, he could bind it as effectually as it could bind itself by corporate vote when taking up money by an agreement that payment should be secured by the previous mortgage, provided (in the interest of other creditors) the aggregate should not exceed the extreme limit of one hundred thousand dollars. Of course a corporate vote was necessary to a valid mortgage by its financial agent of the real estate of the [corporation] to the plaintiffs. But all money or other personal property or rights therein coming into its possession because of the mortgage security thus given were at the disposal of its general unlimited financial agent, equally with any other personal property belonging to it. A corporate vote is not made necessary to the valid disposition of this right in personal property because of the mention of it in a sealed instrument. Therefore, if we should concede that, as against the plaintiffs, the agreement between them and the [corporation] constituted a valuable right in the possession of the latter, nevertheless [its president] had absolute power of disposal of this right for its benefit. He could exchange, sell, pledge or annul it by his individual action at his discretion. Presumably the agreement by the mortgagor to deliver, and by the mortgagee to receive [the products of the mill], in payment was for the benefit of the latter, and although it has a place in the condition of the mortgage, they were under no obligation to see in it any limitation upon the power of the mortgagor's general financial agent thereafter to borrow, if they should be willing to lend, other and additional sums for its benefit, and make payment therefor in money, [products of the mill], or any other personal property. The purpose of the mortgagee was to give satisfactory security for the loan of one hundred thousand dollars, not at all to bar itself from borrowing other money if a willing lender could be found. As it is the company's duty always to pay its debts, the application of any of its personal property or rights in stock at any time to that use by its accredited

of the business of the corporation.[1] And a corporation, for instance, engaged in the business of conveying water through ditches for sale to miners, would not be bound by a contract of its president for a purchase of additional ditch property with a view of extending the operations of the corporation, as this would not be a matter within the ordinary course of the business of the corporation.[2] The managing board of a private corporation having conferred, by a resolution of such board, upon the president of the corporation the full power of the corporation in reference to municipal street work, the president of the corporation may contract with a city on behalf of the corporation to improve a street.[3] If made the duty of a president of a corporation to generally supervise its entire business, and it be provided that all of the property of the corporation shall be under his control, by a by-law of the corporation, and it appears that for many years its president has acted as its attorney, and looked after its litigation, such facts will be evidence of his authority to employ counsel to look after the interests of the corporation in any pending litigation.[4] A corporation may be bound by its president's entering satisfaction of a judgment in its favor, after an assignment to a third person, though the satisfaction piece be not under the seal of the corporation.[5] The president of a manufacturing corporation, who is also its superintendent, clothed with general authority to contract by parol, without the seal of the corporation, for

financial agent without limitation is binding upon it. And whatever valuable property right as against [the pledgor], the [corporation] had in the use and application of his shares, [stock of another corporation pledged to it], that right was at the disposal of [its president] for the benefit of the company by sale or pledge, [the pledgor's] rights of course not to be affected by any act of [the president] not authorized or ratified by himself."

[1] Blen v. Bear River & Auburn Water & Mining Company, (1862) 20 Cal. 602.

[2] Ibid. In Shaver v. Bear River & Auburn Water & Mining Co., (1858) 10 Cal. 396, the court held that the president of this corporation had authority to bind the corporation for the purchase of a house to be used as an office for the corporation and as a boarding house for the laborers it employed under a resolution of the corporation vesting him with discretionary power as to "all matters pertaining to the prosecution of the projects of the company," and if his authority were doubtful, the acts of the corporation amounted to a ratification of the contract.

[3] Oakland Paving Company v. Rier, (1877) 52 Cal. 270.

[4] Wetherbee v. Fitch, (1886) 117 Ill. 67; s. c., 7 N. E. Rep. 513.

[5] Booth v. Farmers & Mechanics' Bank, 50 N. Y. 396.

making and delivering its manufactured goods, has like authority, unless the power is withdrawn, to authorize the termination and release of such a contract.[1] A railway corporation will be bound by a contract made by its president, in its behalf, and within the scope of its chartered powers, to pay fixed sums of money to the proprietors of a railway bridge for the use of the same, where it is made known to the directors and stockholders and not disapproved by them within a reasonable time.[2] No proof of the authority of the president of a corporation will be required to establish an assignment made by the corporation, through its president, of a special tax bill.[3] The lease of an office is within the usual powers of the president of a corporation, and his declarations, when making such a contract, are evidence of the intended purpose for which it may be leased.[4] A corporation will be bound by the act of its president, after its organization, in receiving a conditional subscription.[5] A corporation will be bound by its president's receiving a promissory note, on settlement against the maker, though made payable to the president or his order by his individual name, if he has been in the habit of acting as its business agent, with the knowledge of the corporation and without objection on its part.[6] It is within the scope of a president's authority, as president, to undertake to bring before the board of directors of a corporation, at a time specified, a demand against the corporation for money borrowed by an agent of the corporation, and the corporation will be bound to consider the demand at the time specified.[7]

[1] Indianapolis Rolling Mills *v.* St. Louis, Fort Scott & Wichita Railroad, (1887) 120 U. S. 256; s. c., 7 Sup. Ct. Rep. 542.

[2] Pittsburgh, Cincinnati & St. Louis Ry. Co. *v.* Keokuk & Hamilton Bridge Co., (1889) 131 U. S. 371; s. c., 9 Sup. Ct. Rep. 770.

[3] Bambrick *v.* Campbell, (1889) 37 Mo. App. 460.

[4] Baltimore & Philadelphia Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13.

[5] Pittsburgh & Connellsville R. R. Co. *v.* Stewart, 41 Pa. St. 54.

[6] Dougherty *v.* Hunter, 54 Pa. St. 380. As to power of president to appoint attorneys for looking after litigation of corporation, see Reno Water Company *v.* Leete, 17 Nev. 203; s. c., 30 Pac. Rep. 702; American Insurance Co. *v.* Oakley, 9 Paige, 496; s. c., 38 Am. Dec. 561; Wetherbee *v.* Fitch, 117 Ill. 67; s. c., 7 N. E. Rep. 513. As to president's indorsing commercial paper for transfer, see Irwin *v.* Bailey, 8 Biss. 523; Howland *v.* Myer, 3 N. Y. 290; Caryl *v.* McElrath, 3 Sandf. 176; Palmer *v.* Nassau Bank, 78 Ill. 380. As to power of the president of a bank to contract for the bank, see Case *v.* Hawkins, 53 Miss. 702.

[7] Union Gold Mining Co. *v.* Rocky Mountain Bank, 1 Colo. 531. As to making sales of commodities of cor-

§ **147. Illustrations of his lack of power.**—The president of a corporation has no legal power or authority to deplete the coffers of the corporation by instructing the treasurer to refuse to accept subscription money when tendered.[1] An authority given by a resolution of the board of directors to a president of a corporation "to make all contracts and draw on the treasurer for all disbursements (countersigned by the secretary) under the direction of the board," does not confer upon the president power to make contracts for, or otherwise bind, the corporation without the "direction of the board" of directors, and his acceptance of a bill drawn upon him as president, without the direction of the board of directors, would not bind the corporation.[2] There is no power in the president of a corporation, by virtue of his office, to purchase or sell real property for the corporation at his discretion. Such power can be conferred only by the board of trustees.[3] A resolution being upon the minutes of a corporation forbidding its president purchasing such goods, the president cannot bind it for goods purchased.[4] Where a contract has been entered into by authority of its board of directors, the president of a cor-

poration in the usual course of the business of the corporation, see Horton Ice Cream Company *v.* Merritt, 63 Hun, 628; s. c., 17 N. Y. Supp. 718; 43 N. Y. St. Repr. 416. As to the effect of a president's acknowledgment of a debt, taking it out of the Statute of Limitations, see Morgan *v.* Merchants' Bank, 13 Lea, (Tenn.) 234.

[1] Potts *v.* Wallace, (1892) 146 U. S. 689, 705; s. c., 13 Sup. Ct. Rep. 196, in which the question whether or not a subscriber to the stock had been released from his obligation to pay it for the benefit of the creditors by the action of the president or otherwise. The court followed Bank of the United States *v.* Dunn, 6 Pet. 51, where it was held that an agreement by the president and cashier that the indorser on a note shall not be liable on his indorsement does not bind the bank; that it is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank except in the discharge of their ordinary duties. The court, in Potts *v.* Wallace, *supra*, further said: "It is true that if the acts of the president are ratified by the corporation, or the corporation permits a general course of conduct or accepts the benefit of his act, they will be bound by it. But the general rule is that the president cannot act or contract for the corporation except in the course of his usual duties. And the rule is still stronger against the power of the president to bind the corporation by giving up its securities or releasing claims in its favor."

[2] Lazarus, Use of, *v.* Shearer, (1841) 2 Ala. 718.

[3] Bliss *v.* Kaweah Canal & Irrigation Co., (1884) 65 Cal. 502.

[4] Westerfield *v.* Radde, 7 Daly, 326. In Smith *v.* Smith, (1875) 117 Mass. 72, it appeared that a corporation held a mortgage of land assigned to it by the mortgagee as collateral security for the

poration, without the assent of the directors, has no power to modify it.[1] The president of a corporation, as such, has no power to bind the corporation by any act outside his official duty.[2] The superintendent of a mining corporation has no authority, *virtute officii* merely, to borrow money on the credit of the corporation.[3] And the president of such a corporation has no power, as presi-

payment of a note which was also secured by a mortgage of other land owned by him. By vote afterwards the corporation authorized its president and secretary to cancel the principal mortgage, but, by mistake, the president discharged both mortgages upon the record. There was a provision in the charter of the corporation that the president should keep the corporate seal, but the only provision in its charter or its by-laws relating to the execution of contracts in its behalf was, that the corporation should be bound by all instruments which it should lawfully make, when executed in its name and pursuant to its rules, signed and delivered by the president, secretary, treasurer or other officers or persons it should appoint, and sealed by its common seal. The Supreme Court of Judicature held that the discharge of the collateral mortgage was without authority from the corporation and void.

[1] Western Railroad Co. *v.* Bayne, 11 Hun, 166; s. c., 75 N. Y. 1. For classes of contracts or agreements in which a president cannot bind the corporation, see Spyker *v.* Spence, 8 Ala. 333; First National Bank *v.* Reed, 36 Mich. 263; St. Nicholas Insurance Co. *v.* Howe, 7 Bosw. 450; First National Bank *v.* Bennett, 33 Mich. 520; Leavitt *v.* Connecticut Peat Co., 6 Blatchf. 139; Leggett *v.* New Jersey Manuf. Co., 1 N. J. Eq. 541; s. c., 23 Am. Dec. 728; Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306; s. c., 16 S. W. Rep. 1078; McKeag *v.* Collins, 87 Mo. 164; Olney *v.* Chadsey, 7 R. I. 224; Hodge *v.* First National Bank, 22 Gratt. 51; Brouwer *v.* Appleby, 1 Sandf. 158; Hone *v.* Allen, 1 Sandf. 171, note; Thompson *v.* McKee, 5 Dak. 172; s. c., 37 N. W. Rep. 367; Ellsworth Woolen Manufg. Co. *v.* Faunce, 79 Me. 440; s. c., 10 Atl. Rep. 250; Ashuelot Manufg. Co. *v.* Marsh, 1 Cush. 507; Globe Works *v.* Wright, 106 Mass. 207; White *v.* Westport Cotton Manufg. Co., 1 Pick. 215; s. c., 11 Am. Dec. 168; E. Carver Company *v.* Manufacturers' Ins. Co., 6 Gray, 214; Markey *v.* Mutual Benefit Ins. Co., 103 Mass. 78; Merchants' National Bank *v.* Rawls, 7 Ga. 191; s. c., 50 Am. Dec. 394; Asher *v.* Sutton, 31 Kans. 286; Reynolds, etc., Constr. Co. *v.* Police Jury, 44 La. Ann. 863; s. c., 11 So. Rep. 236; Potts *v.* Wallace, 146 U. S. 689; s. c., 13 Sup. Ct. Rep. 196; Bank of United States *v.* Dunn, 6 Pet. 51; Weeks *v.* Silver Islet Consolidated Mining Co., 55 N. Y. Super. 1; s. c., 8 N. Y. St. Repr. 110; First National Bank *v.* Lucas, 21 Neb. 280; s. c., 31 N. W. Rep. 805; Foster *v.* Essex Bank, 17 Mass. 479; s. c., 9 Am. Dec. 168; Dowd *v.* Stephenson, 105 N. C. 467; s. c., 10 S. E. Rep. 1101.

[2] Perry *v.* Simpson Waterproof Manufacturing Co., 37 Conn. 531. In Stallcup *v.* National Bank of the Republic, (1888) 15 N. Y. St. Repr. 39, in the absence of proof of the authority of its president to accept drafts of a corporation upon the bank, and in the face of evidence that the obligee of the drafts knew that similar transactions of the president had failed to meet the sanction of the directors, the bank was held not to be liable.

[3] Union Gold Mining Co. *v.* Rocky Mt. Bank, 2 Colo. 565.

dent, to undertake, in the corporate name, for the repayment of such an unauthorized loan.[1] The Illinois Appellate Court sustained a decree dismissing a bill to compel a corporation to renew a lease of a building belonging to it, because of a lack of power or authority in the president of the association to bind it by an agreement to make or renew a lease of its estate.[2]

§ 148. What would show the authority of a president.— A corporation admitting, at the trial of a case, that the one making the contract which the corporation claimed to be unauthor-

[1] Ibid.

[2] Koch *v.* National Union Building Association, (1890) 35 Ill. App. 465; affirmed in 137 Ill. 497; s. c., 27 N. E. Rep. 530. The court said: "The president of a corporation has not, as matter of law, and merely by reason of his holding said office, power or authority to execute deeds, mortgages or leases of the real estate of the corporation. Hoyt *v.* Thompson, 19 N. Y. 207. The implied powers of the president of a corporation depend upon the nature of the company's business, and the measure of authority delegated to him by the board of directors. It seems that the president has no greater powers, by virtue of his office merely, than any other director of the company, except that he is the presiding officer at the meeting of the board. Morawetz on Corporations, § 537. There is no proof in the record as to what the business of [defendant corporation] is, but it is shown that its business, whatever it may be, is carried on under certain by-laws, section 9 of which by-laws relates to the duty of the president, and, among other things, provides that 'he shall execute all bonds, contracts, leases or other instruments required to be made or executed by authority of the board for and on behalf of the association, which shall also be signed by the secretary.' Here we find the authority of the president with reference to executing leases defined, and while it is true that it has been said by the Supreme Court of this state that an act done by the president will be presumed to be legally done and be binding on the body, that rule applies 'in the absence of legislative enactment or provision made in the by-laws.' Smith *v.* Smith, 62 Ill. 493. The business affairs of corporations are controlled exclusively by their boards of directors, and such board may undoubtedly invest the president with authority to bind the corporation by deed or lease, either by express resolution or by an acquiescence in his assumption of authority in that respect, which would justify persons who dealt with him in the inference that he had such authority in fact. So if the act is one incident to the execution of the trust reposed in him, such as custom or necessity has imposed upon this office, he may perform it without express authority. Mitchell *v.* Deeds, 49 Ill. 416. As we understand Union Mutual Life Ins. Co. *v.* White, 106 Ill. 67, it simply holds the corporation bound by acts which, from the course of its business, were within apparent power of the president and general agent when those officers were acting for the corporation in a state where the corporation was doing business by comity, the home or residence of the corporation being in another state."

ized was its president and superintendent as well as general manager, the Supreme Court of California held to be sufficient evidence of his authority to make the contract, and it was not necessary, upon the party seeking to enforce it, to show any vote or other corporate act constituting him the agent of the corporation.[1]

[1] Crowley *v.* Genesee Mining Company, (1880) 55 Cal. 273. It was said in the opinion: "The common-law rule that a corporation has no capacity to act or to make a contract, except under its common seal, has long since been exploded in this country. Even in England it has been found to be impracticable, so that the classes of cases which constitute exceptions to the rule have become so numerous that the exceptions have almost abrogated the rule. In the United States nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts. If this were not so," says Mr. Chief Justice REDFIELD, "it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations in this country, is without any formal meetings or votes of the board. Hence, there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted. If this were not done, it would become impossible to dispose of such contracts with any hope of reaching the truth and justice of the right and duties of the several parties involved. * * * This is merely holding corporations to such rules of action as they see fit to adopt for their own guidance and the transaction of their business." Bank of Middlebury *v.* Rutland R. R. Co., 30 Vt. 159. * * * It would not be in accordance with justice or the interests of society to allow corporations to deny the authority of such agents, or to repudiate contracts made by them for work and labor from which they derive benefit. So, in Goodwin *v.* Union Screw Company, 34 N. H. 378, where it appeared that the business of manfacturing screws was conducted under the general management of one of its directors, who made verbal contract with the plaintiff to work in the shop, at manufacturing screws for the defendant, the Supreme Court of New Hampshire held that where one has the actual charge and management of the general business of a corporation, with the knowledge of the members or the directors, this is sufficient evidence of authority, and the company will be bound by his contracts made in their behalf, within the apparent scope of the business intrusted to him. And in Wilson Sewing Machine Company *v.* Boyington, 73 Ill. 534, where it appeared that an architect had drawn plans for a building for a corporation under a verbal contract made with one who was acting as president, executive manager and principal stockholder of the company, the Supreme Court of Illinois held that the contract was binding upon the corporation. "A corporation," says the court, "which suffers appearances to exist, and its officers and agents to so act as to give one employed by such officers and agents reason to believe that he is employed by the company, becomes liable to such person as his employee, to pay for the services rendered."

§ 149. **Question of authority for the jury.**— In a case before the New York Court of Appeals, which was an action upon certain promissory notes made payable to a domestic corporation and indorsed by its president, it appeared that the corporation had its main office in the city of New York, and while a portion of its business was transacted and most of its purchases and sales were made in other states and countries, its principal business operations were carried on in that city, and the annual meeting of its directors was there held. The person who indorsed these notes was president and treasurer, the general manager of all the corporation's business affairs in that city, and the only officer in attendance at its office there; he paid the current accounts of the company and indorsed checks made payable to its order. The discount of business paper and the use of its money for its purposes, and the account of the same on its cash books were daily and permitted transactions. The corporation had no cash capital, and its working capital was borrowed on the credit of the company, and this borrowing was done principally by the president, and mainly by the use of paper indorsed by him in the name of the corporation. The evidence on the trial tended to show that this was with the knowledge and acquiescence of the directors. The Court of Appeals held that it was error in the lower court to dismiss the complaint; that the evidence required the submission of the question of the authority of the president of the corporation to bind it by indorsements to the jury.[1]

§ 150. **Power of a president as to execution of notes.**— The making of promissory notes of a corporation by its president to one who, at his instance and request, may advance money to pay indebtedness of the corporation to save it from a law suit, is within the scope of the business intrusted to him as superintendent and general agent of the corporation.[2]

[1] Fifth National Bank of Providence, R. I., *v.* Navassa Phosphate Company, (1890) 119 N. Y. 256; s. c., 23 N. E. Rep. 737.

[2] Seeley *v.* San José Independent Mill & Lumber Co., (1881) 59 Cal. 22. The court distinguished Hall *v.* Auburn Turnpike Co., 27 Cal. 255; Davis *v.* Rock Creek, L. F. & M. Co., 55 Cal. 359; San Diego *v.* S. D. & L. A. R. R. Co., 44 Cal. 106; Wilbur *v.* Lynde, 49 Cal. 290. In Farmers & Mechanics' Bank of Savings *v.* Colby, (1883) 64 Cal. 352, it was held that a note signed by one as president of a corporation and another as secretary *pro tem.*, they, at the time of its execution, discharging the duties of those respective offices, was the note of the corporation, and imposed no personal liability

§ 151. In what cases the authority of a president may not be questioned.— The knowledge of all the members of a board of directors of a corporation, except one, who was absent from the county, the concurrence at the time of those who remained in the county, or their long-continued acquiescence afterward, has been held by the Supreme Court of Judicature of Massachusetts to have made valid, as the act of the corporation, the execution of a mortgage of its personal property, without special authority therefor, by its president, who was general manager of its business.[1] In case the president of a corporation, who is its managing officer and makes its contracts, enters into a fraudulent contract on its behalf, the corporation cannot escape liability on the ground that the president conducted the transaction without its knowledge or concurrence.[2] The by-laws of a corporation cannot be set up by the corporation as counteracting the authority conferred upon its president by permitting him to hold himself out to the public as its general manager and director of its business.[3] A corporation accepting the benefit of work done or materials furnished, upon the order of its president, will be estopped to deny the power of the president to make the contract.[4] The authority of a president of a corporation to subscribe for stock in another may be presumed upon the facts that the stock was received by an agent of the corporation he represented and retained by it, and that the stock on several occasions may have been voted by an officer or member of such corporation.[5]

upon them as individuals. In National Spraker Bank *v.* Treadwell Co., (1894) 80 Hun, 363, where a promissory note of a corporation was executed by its president, but not signed by its treasurer in accordance with the by-laws of the corporation, the Supreme Court of New York in General Term held that the fact constituted no defense to an action on the note, if the paper was not diverted from its original purpose and went into the hands of a *bona fide* holder and the corporation received the benefit of the proceeds.

[1] Sherman *v.* Fitch, (1867) 98 Mass. 59.

[2] Grand Rapids Safety Deposit Co. *v.* Cincinnati Safe & Lock Co., 45 Fed. Rep. 671.

[3] Marine Bank of Buffalo *v.* Butler Colliery Co., 52 Hun, 612; 23 N. Y. St. Repr. 318; s. c., 5 N. Y. Supp. 291; affirmed in 125 N. Y. 695; Bank of Attica *v.* Pottier & Stymus Mfg. Co., 49 Hun, 606; s. c., 1 N. Y. Supp. 483; 17 N. Y. St. Repr. 327. When a corporation is estopped to deny the authority of its president, see Alexander *v.* Brown, (1877) 9 Hun, 641.

[4] Brown *v.* Wright, (1887) 25 Mo. App. 54.

[5] Elysville Manufacturing Co. *v.* Okisko Company, 1 Md. Ch. 392; affirmed in 5 Md. 152. In Grape Sugar Manufacturing Co. *v.* Small, (1874) 40 Md. 395, an action to recover for work done under a contract with the acting

§ 152. Giving a judgment note — New Jersey.— The president of a corporation has no power, in virtue of his office, as president, to execute a bond and warrant of attorney for the entry of a judgment by confession against the corporation.[1] The

president of this manufacturing corporation, the Court of Appeals held that it was not necessary to prove that the president was authorized by a direct vote or resolution of the corporation to make the contract. The work being necessary to enable the corporation to carry on the business for which it was incorporated, and accepted by it without objection, and without any intimation that its acting president was not authorized to make such contract, the jury on the trial might presume that the work was done by the authority of the corporation, or that it was subsequently accepted, and the contract ratified. In the same case it was further held that where, under the contract made with the acting president of the corporation after the certificate of incorporation was signed by the members of the proposed corporation, but before it was recorded, as required to constitute it a body politic under the General Incorporation Law, the work was done for the corporation and accepted after its incorporation was complete, the corporation would be estopped, both at law and in equity, from denying its liability on account of the same. See, as to the liability of corporations under similar circumstances, Baltimore City P. Ry. *v.* Sewell, 35 Md. 251; Edwards *v.* Grand Junction Ry. Co., 1 Mylne & Cr. 650; Wesley Church *v.* Moore, 10 Pa. St. 273; Attorney-General *v.* Corporation of Leicester, 9 Beav. 546; Hughes *v.* Antietam Manufacturing Co., 34 Md. 324; Fister *v.* La Rue, 15 Barb. 323; Low *v.* Connecticut & Passumpsic Railroad, 46 N. H. 284. As to estoppel of a corporation to deny the authority of its president to bind it where he has been held out to the public as possessing authority, see Ceeder *v.* H. M. Loud & Sons Lumber Co., 86 Mich. 541; s. c., 49 N. W. Rep. 575; 24 Am. St. Rep. 134; Sherman Center Town Co. *v.* Swigart, 43 Kans. 292; s. c., 23 Pac. Rep. 569; 19 Am. St. Rep. 137; Fitzgerald Constr. Co. *v.* Fitzgerald, 137 U. S. 98; s. c., 11 Sup. Ct. Rep. 36; Olcott *v.* Tioga, etc., R. R. Co., 40 Barb. 179; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306; s. c., 16 S. W. Rep. 1078; Washington Savings Bank *v.* Butchers', etc., Bank, 107 Mo. 133; s. c., 17 S. W. Rep. 644; 28 Am. St. Rep. 405; Dougherty *v.* Hunter, 54 Pa. St. 380; Libby *v.* Union National Bank, 99 Ill. 622; Neiffer *v.* Bank of Knoxville, 1 Head, (Tenn.) 162. Estoppel by reason of a presumption that corporation has ratified a contract of its president. West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192; s. c., 15 S. E. Rep. 524; Belleville Savings Bank *v.* Winslow, 35 Fed. Rep. 471; Bagaley *v.* Pittsburg Iron Co., 146 Pa. St. 478; s. c., 23 Atl. Rep. 837; Shaver *v.* Bear River, etc., Co., 10 Cal. 396.

[1] Stokes *v.* Jersey Pottery Co., (1884) 46 N. J. Law, 237. *Arguendo*, DEPUE, J., for the court said: "The powers of the president of a corporation, *virtute officii*, over its business and property are strictly the powers of an agent — powers delegated to him by the directors, who are the managers of the corporation, and the persons in whom, as its representatives, the control of its business and property is vested. If the corporation be organized for business purposes, the president is its chief executive officer. He

Court of Errors and Appeals of New Jersey has held that such a judgment did not acquire validity from the fact that the money advanced by the plaintiff was applied for the benefit of the company. "From that fact," it was said, "a debt would arise and

may, without any special authority from the board of directors, perform all acts of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts arising in the usual course of its business. Boone on Corp. § 144. To this extent, the president, in virtue of his election as such, becomes the agent of the corporation. Beyond the powers which usage and custom and the necessities and convenience of business require in the executive officer of a corporation, he has no more control over the corporate property and funds than any other director. As illustrative of the restricted powers of a president of a corporation in the management of its business and control over its property, I will refer only to two cases in our own courts. In Titus *v.* Cairo & Fulton R. R. Co., this court held that a power of attorney executed by the president of a corporation, authorizing a sale of its bonds in the market, gave the agent no power to sell, and that the president could not execute such a power without the authority of the board of directors. In delivering the opinion of the court, Mr. Justice Van Syckel said: 'In the absence of anything in the act of incorporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of a president or other officer, unless it is shown to pertain to his official duty or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. The authority requisite to charge the company must, therefore, be derived from the board of directors.' 8 Vroom, 98–102. The other case is Leggett *v.* New Jersey Banking Co., Saxt. 541. In that case the charter of a bank provided that the affairs, property and concerns of the corporation should be managed by its directors; and the Court of Chancery held that, although a mortgage executed under the authority of the board of directors would be valid, a mortgage executed by the president and cashier under the corporate seal, without the authority or concurrence of the board of directors, was not a valid instrument. The reasoning on which the cases cited were decided applies to the case now before the court. The plaintiff by his judgment and the execution thereon, has acquired a lien on all the property of the corporation; and I cannot find in principle any distinction between a mortgage or conveyance of the lands of a corporation and a judgment upon bond and warrant of attorney upon which the property, real and personal, of the corporation is taken. Such a transaction is not within the ordinary business of a corporation, which the president, as its executive officer is, in virtue of his office, authorized to transact. There are cases in which the powers of an officer of a corporation, and his authority to act for the company, are enlarged beyond those powers which are inherent in his office. But these are cases in which the agency of the officer has arisen

an obligation on the part of the corporation to pay the debt in common with its other debts would result; but the plaintiff cannot hold his security which gives him a lien upon the company's property, unless his security is a valid security thereon, especially when the rights of the other creditors are involved."[1] The facts that a president owned the bulk of the capital stock of a corporation, and that he was the superintendent of its business and its treasurer, as well as the active manager of its affairs, and had been accustomed to borrow money for the use of the corporation, it has been held would not give him power to incumber its property by mortgage or confession of judgment for money borrowed.[2]

§ 153. **The same subject — Illinois.**— The Illinois Appellate Court has said, as to the power of a president of a corpora-

from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Taylor on Corp. 202, 236–244; Ang. & A. on Corp. §§ 299–302. Thus, when, in the usual course of the business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. Martin *v.* Webb, 110 U. S. 7. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent — a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations." The court then applied these principles to the case at bar, saying: "But the depositions laid before the court do not bring the case in hand within the range of the authorities above referred to. The only proof on that subject is that Cook [the president of the company] was the owner of all the capital stock of the company except two shares; that he was president and treasurer and the active manager of the company, using the money of the corporation as he saw fit, and borrowing money for the company so far as its banking business was concerned; that at one time he effected a loan upon mortgage, but that the mortgage was made by the authority of the directors, and that he never undertook to execute in the corporate name papers of the character of the security in question, without the assent of the directors, except in this instance. * * * Incident to the power of Cook to borrow money for the company's use was the power to secure the debt in the usual way; but the power to contract the debt did not carry with it the power to incumber the company's property by a mortgage or judgment confessed as a security for its repayment."

[1] Stokes *v.* New Jersey Pottery Co., (1884) 46 N. J. Law, 237; citing Hackensack Water Co. *v.* De Kay, 9 Stew. Eq. 548.

[2] State Bank *v.* Holcomb, 7 Halst. 196.

tion to confess judgment: "We think it plain, both upon principle and from the authorities, that the president of a corporation has not, as a matter of law, and simply by virtue of his office as president, authority to either confess judgment against such corporation or execute a warrant of attorney empowering another so to do. Such matters form no part of the ordinary business of the company which the president, as its executive officer, is authorized to transact *virtute officii.* The power in question is not inherent in or incident to the office from either usage or necessity.[1]

[1] Joliet Electric Light & Power Co. *v.* Ingalls, (1887) 23 Ill. App. 45; citing Stokes *v.* New Jersey Pottery Co., (1884) 46 N. J. Law, 237; Thew *v.* Porcelain Mfg. Co., 5 S. C. 415. The court, in Joliet Electric Light Co. *v.* Ingalls, *supra,* discussed the facts and the law applicable to them in the case in these words: "It is one of the elements of a *prima facie* case that it is subject to be rebutted and destroyed by evidence to the contrary. The case of the defendant in error is not that of a stranger to the corporation dealing with the agents of the corporation and without actual notice of the power and authority given to such agents by the corporation or its directors. It would in many instances be difficult and even impossible for such stranger to ascertain with certainty and precision what the proceedings of the corporate board were. As between such third party and the corporation the rule sometimes applies that where one of two innocent parties must suffer for the unauthorized act of an agent the loss should follow [fall on?] him who selected the agent. Taylor on Private Corporations, § 203. Here defendant in error was himself a member of the board of directors of the [corporation], and present at and participating in its meeting of the [date of this action of the officers], and, moreover, was secretary of the company, and kept and had the custody of the record of the proceedings of such meeting. He had actual and full notice that all that the board of directors did on that occasion was to accept without qualification the written offer that he himself had made for the sale of the plant of [another electric light company], and on the very terms proposed by himself, and also that the only papers the board authorized the president to execute, and himself as secretary to affix the seal of the corporation to, were 'the necessary papers to complete said contract.' What contract? Evidently the contract shown by the written proposition of defendant in error to sell the plant for [a fixed sum], payable as stated therein, 'and' secured by notes and mortgage or other instruments upon all the plant offered' for sale, and by the resolution of the board accepting the said proposition. It would seem the reasonable construction of the transaction must necessarily be as shown by the offer and the simple acceptance thereof without qualification or counter offer, that the completed contract between the parties was, that in respect to security for the purchase money the special terms proposed, *i. e.,* 'notes and mortgage upon all the plant,' constituted the contract, and that under the agreement defendant in error could have demanded nothing more or other than notes and mortgage, and that a tender by plaintiff in error of such

§ 154. Where contract of purchase includes giving a judgment note.— In a case where a corporation wishing to purchase property for its use, contracted for advances of money for the purpose for which the corporation was to execute its note with a warrant of attorney to have judgment on the same, the Supreme Court of Illinois fully considered the propriety of the judgments upon this particular note, the authority of the officers in the matter and the execution of the notes, and declared the following rules in such case to be that: Where the president of a corporation is authorized to enter into a contract, under which another is to loan the corporation money, and the president is to make and deliver, on its behalf, a note for the money loaned, secured by a warrant of attorney to confess judgment, and such contract is entered into, and the president, in pursuance of its provisions, gives the warrant of attorney, the act will be binding on the corporation, even in the absence of the adoption of any resolution empowering him to give the warrant of attorney.

notes and mortgage would have been in full payment of the contract made. Even if instruments other than 'notes and mortgage' could rightfully have been asked for under the contract, yet it is plain they must necessarily have been instruments which, when given, extended to and covered the plant of the [other corporation] and no more, the words 'upon all the plant offered' being words of limitation. It can hardly be successfully contended that under an executory agreement to give 'notes and mortgage,' payment notes, or notes with warrants of attorney attached or incorporated, authorizing confessions of judgment, can be demanded. The expression 'notes and mortgage' must be presumed to have been understood by the contracting parties in their usual, ordinary and natural sense, and as indicating only simple promissory notes secured by a mortgage upon property. One condition, then, is that warrants of attorney were not called for or included in either of the expressions used in the proposition submitted to the board of directors and accepted by them; that defendant in error had ample notice that the authority given by the board of directors to the president of the corporation to execute papers and to the secretary to affix the corporate seal thereto, was, by the order of said board, expressly limited to such papers as were necessary in order to carry into effect the contract made, and further, as has been already stated, that there was no inherent power vested in the president, *virtute officii*, to give a judgment note that would bind the company. In the case of Hoyt *v.* Thompson, 5 N. Y. 320, it was held that a deed formally executed under the corporate seal, and bearing upon its face the presumption that it was executed by the competent authority from the corporation, was void, and not the deed of the corporation, because it was actually executed by the executive officers without authority, and known by the grantee to have been so executed. The same rule has application to the matter now in hand."

Where a promissory note and warrant of attorney are executed in the name and under the seal of a corporation, it will be presumed that such instruments were properly executed by the authority of the corporation. The common seal of a corporation being affixed to an instrument, and the signatures of the proper officers being proved, the courts will presume that the officers did not exceed their authority; the seal itself is *prima facie* evidence that it was affixed by proper authority. Where a private corporation allows its managing officer to so conduct himself, in his dealings and transactions on behalf of the company, as to lead the public, or those dealing with him, to reasonably believe him as possessing certain powers, the company will not be allowed to question such apparent power or authority as against one relying in good faith on the same. If an act performed by an agent of the corporation would, under any circumstances, be within the authority delegated to the agent, a person dealing with him on the faith of his apparent powers, and without a notice of facts showing that the act was unauthorized, may hold the principal liable, whether the act was authorized or not. In giving a note and power of attorney to confess thereon by a corporation, with the president as security, all the papers were properly executed, except that the corporate name was not signed to the note. Afterwards the secretary of the company, by the direction of the president, put the name of the company to the note. Such action was held sufficient to cure the defective execution of the note, especially when the power of attorney in terms imposed on the corporation the duty to pay this note.[1]

[1] McDonald *v.* Chisholm, (1890) 131 Ill. 273; s. c., 23 N. E. Rep. 596. The power of a president of a corporation to confess judgment for it without authority from the directors, has been questioned in Jones *v.* Avery, 50 Mich. 326; s. c., 15 N. W. Rep. 494. The power to confess judgment for the corporation has been held not be in its treasurer. Stevens *v.* Carp River Iron Co., 57 Mich. 427; s. c., 24 N. W. Rep. 160. As to the authority of a president of a corporation to confess judgment against the corporation, see Raub *v.* Blairstown Creamery Assn., (N. J. 1894) 28 Atl. Rep. 384. As to confession of judgment under a warrant signed by a director, the treasurer and general manager of a corporation without authority of the board of directors or an executive officer, see Jackson *v.* Cartwright Lumber Co., 2 Pa. Dist. Rep. 680. See, on confession of judgment by officer, Adams *v.* Crosswood Prg. Co., 27 Ill. App. 313; Freeman *v.* Plaindealer Co., 9 Luz. Leg. Reg. 37; McMurray *v.* Oil Co., 33 Mo. 377. In Chamberlin *v.* Mammoth Mining Co., (1854) 20 Mo. 96, it was held that the president of a mining corporation might appear and confess judgment for the corporation.

§ 155. **What raises a presumption of authority.**— The common seal of a corporation being affixed to a deed, as an assignment for the benefit of creditors, and the deed being signed by the officers authorized by the charter to sign it or attest its contracts, raises the presumption that the instrument was executed by the authority of the corporation. Any one assailing it must show its invalidity.[1] When the common seal of a corporation is affixed to an instrument in writing purporting to be executed by it, and the signatures of the proper officers of the corporation are affixed to it and proved, courts will presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority.[2] In the absence of the common seal of a corporation or of proof of facts from which the existence of a resolution of authorization, or of the authority itself may be inferred, the authority of the officers of a corporation to execute a conveyance can only be established by resolution of the managing board, entered in the proper book of the corporation.[3]

§ 156. **Power of officers acting conjointly.**— The government and direction of the affairs of a corporation being vested by statute in a board of not less than five, of which a majority "shall form a board and shall be competent to transact the business of the company," such majority, when assembled, though without notice to the others, possess all the powers of the board, as in this case, to authorize a sale of the stock of the corporation.[4] There being no charter provision to the contrary, it will be pre-

[1] Thorington *v.* Gould, (1877) 59 Ala. 461. BRICKELL, Ch. J., said: In Bank of United States *v.* Dandridge, 12 Wheat. 70, it is said, after referring to the presumptions indulged for and against natural persons: "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter." Again, "if officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

[2] Southern California Colony Association *v.* Bustamente, (1877) 52 Cal. 192; Bliss *v.* Kaweah Canal & Irrigation Co., 65 Cal. 502.

[3] Southern California Colony Association *v.* Bustamente, (1877) 52 Cal. 192.

[4] State ex rel. Page *v.* Smith, 48 Vt. 266.

sumed that the president, secretary and treasurer of a corporation are authorized to make all necessary contracts in transacting the ordinary business of the corporation, within the legitimate scope, objects and purposes of its organization.[1] The president and secretary of a corporation are proper officers to agree on its behalf upon an arbitration.[2] There being in manufacturing and trading corporations a power to borrow money, as incident to their power to purchase stock and materials, and to give security by pledging the property so purchased, and as corporations can act only by their officers, the treasurer and general agent of a corporation unitedly have power to borrow money for the use of the corporation, give its negotiable note and pledge its personal property for the same, as well as to execute the necessary documents, notwithstanding the by-laws of such corporation give these officers specific powers not including such acts as are above referred to.[3] A corporation may bind itself by a note and mortgage, made by its president and secretary and signed by them in their official capacity as such.[4] The president and secretary of a manufacturing corporation, even if the powers of general managers be conceded them, though they may bind the corporation to any debt within the scope of its ordinary business, cannot bind it to assuming another and distinct corporation's debts, nor by a promissory note for the payment of such a third party's debt.[5] The president and secretary of a corporation are presumed to

[1] Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332; s. c., 27 N. W. Rep. 524.

[2] Fitch *v.* Constantine Hydraulic Co., 44 Mich. 74; s. c., 6 N. W. Rep. 91.

[3] Fay *v.* Noble, (1853) 12 Cush. 1. In Leonard *v.* Burlington Mutual Loan Association, (1881) 55 Iowa, 594; s. c., 8 N. W. Rep. 463, the corporation was held liable for money had and received on account of sums advanced to its secretary and manager and by him paid into its treasury, notwithstanding this officer was at the time a defaulter and not authorized to borrow money on its account.

[4] Rowe *v.* Table Mountain Water Company, (1858) 10 Cal. 441; approved in Verzan *v.* McGregor, 23 Cal. 339, 347.

[5] Rahm *v.* King Wrought Iron Bridge Manufactory of Topeka, (1876) 16 Kans. 277. In Stark Bank *v.* U. S. Pottery Company, (1861) 34 Vt. 144, is was held that the assuming of a debt of a third person was not within the ordinary power of the treasurer of a corporation, it not being in the usual course of business, and to bind the corporation, it would be necessary to show some special authority granted him to do so. Further, that the directors of the corporation had no power to assume such a debt except in case of urgent necessity, which was a question of fact for the jury.

have authority to execute a promissory note in the name of the corporation, and the holder of such a note will not be affected by the fact that such authority did not exist, unless he is shown to have had notice thereof.[1]

§ 157. **An illustration on this subject.**— The Florida Supreme Court has held that the assignment of a note payable to the order of a corporation, and the mortgage given to secure its payment by the president and secretary of the corporation, was, upon its face, the act of the corporation through their officers, and not their individual acts.[2]

[1] American Exchange Nat. Bank *v.* Oregon Pottery Co., (1892) 55 Fed. Rep. 265. See, also, Merchants' Bank *v.* State Bank, 10 Wall. 644; Crowley *v.* Mining Co., 55 Cal. 273. In Furniss *v.* Gilchrist, 1 Sandf. 53, the transfer of a note transferable by delivery by the president and secretary of a corporation was held to be valid.

[2] Lay *v.* Austin, (1889) 25 Fla. 933; s. c., 7 So. Rep. 143. The court declared the following rules established by the authorities which governed them in their conclusions: "Where a note is payable to a corporation by its corporate name, and is indorsed by an authorized agent or official with the affix of his official position, it will be regarded that he acts for his principal disclosed on the paper as the payee, and who, therefore, is the only person competent to transfer the legal title. Daniel on Negotiable Instruments, § 416; Randolph on Commercial Paper, § 145. An indorsement by an officer of a corporation is *prima facie* the act of the company. Randolph, § 368; Frye *v.* Tucker, 24 Ill. 180. In McIntire *v.* Preston, 5 Gilman, 48, a note payable to a corporation was assigned thus: 'Without recourse. Joel Scott, Secy.,' and it was held that when properly filled out, as the plaintiff might do on the trial, it was sufficient to pass the legal title to the note, and that the authority of Scott, the secretary, to assign it could only be questioned by plea. See, also, Goodrich *v.* Reynolds, Wilder & Co., 31 Ill. 491. Northampton Bank *v.* Pepoon, 11 Mass. 288, decides the same where the indorsement was in blank, by an authorized attorney signing his name and styling himself attorney. Folger *v.* Chase, 18 Pick. 63, was a case where a note was indorsed by the payee to a bank, and its cashier indorsed it as follows: 'P. H. Folger, Cashier,' and it was objected that the latter indorsement was not made in the name of the corporation; but, said the Supreme Court of Massachusetts, we think the indorsement by the cashier, in his official capacity, sufficiently shows that the indorsement was made in behalf of the bank, and if that is not sufficient the plaintiffs have the right now to prefix the name of the corporation. Nicholas *v.* Oliver, 36 N. H. 218, decides that the indorsement, 'W. Earle, A. Secy., made on a promissory note payable to an insurance company, is to be considered the indorsement of the company, if nothing further appear to indicate that it is intended as the indorsement of some other party. In Russell *v.* Folsom, 72 Me. 436, the indorsement by the treasurer of the payee corporation signing his name and an abbreviation of his office was held to transfer the legal title, and in Farrar *v.* Gilman, 19 Me. 440, the in-

§ 158. Another illustration — one holding several offices. —The by-laws of a Michigan manufacturing corporation provided that one person might hold the offices of president, treasurer and general superintendent, and vested in the president the general supervision of the property and affairs of the corporation, and in the treasurer the custody of its funds and valuable papers, with power to collect and pay out all moneys and sign all acceptances and notes in its behalf, while the superintendent was given general supervision and management of its affairs, subject to the president and board of directors, with power to make all contracts in its behalf, except when otherwise provided by the by-laws. The same person held the three offices for five years, and managed and controlled the affairs of the corporation, if not without advice, certainly without objection, on the part of the stockholders or directors. He finally assigned to a bank to secure existing indebtedness and that which should be thereafter incurred, one hundred and fifty thousand dollars of good and collectible accounts, then existing or thereafter acquired, to be held by the bank as collateral security for existing and future indebtedness of the corporation. The corporation afterwards making an assignment for the benefit of its creditors, the bank filed a bill to enforce the agreement. The Supreme Court of Michigan held that the agreement was one which the president, treasurer and superintendent had the power to make and that it was enforceable in equity.[1]

dorsement by the cashier of the bank was adjudged to be *prima facie* evidence of a legal transfer of a negotiable note. See, also, Chase *v.* Hathorn, 61 Me. 505; Dunn *v.* Weston, 71 Me. 270; Elwell *v.* Dodge, 33 Barb. 336; Marine Bank *v.* Clements, 31 N. Y. 33."

[1] Preston National Bank of Detroit *v.* George T. Smith Middlings Purifier Co., (1890) 84 Mich. 364; s. c., 47 N. W. Rep. 502. CHAMPLIN, Ch. J., dissented solely upon the ground that the contract was too uncertain and indefinite to be specifically enforced. *Arguendo*, as to the authority of this holder of the three positions, it was said by CAHILL, J., for the court: "Conceding that the president must exercise his powers of management in subordination to the board, yet when, as in this case, the stockholders, being the owners, have seen fit to vest certain extraordinary powers of management in the president, and certain other powers in the treasurer and superintendent, and the directors, with full knowledge of this, elect a man to fill all those offices, and thereafter put no restraint upon his management, the board must be held to have consented to his exercising all the power reasonably included in the language by which it was conferred. Bank *v.* Comegys, 12 Ala. 772. The right of the directors to make the security in question is not disputed, yet their authority is given in language no broader than that which defines the duties of the president. If

§ 159. Note executed by a secretary.— In an action against a corporation on a promissory note, signed by one whom the evidence tended to show was the secretary of the corporation and impressed with a stamp which appeared to have been used as the

it be said that the stockholders could not thus usurp the powers of the board and confer them on the president it may be said that the right of the directors to delegate certain of their powers of management to the officers is undoubted, and if the consent of the board was needed to fully invest the president with the power given to him in the by-laws that consent has been given in this case. The question of [the president's] power is largely one of intention on the part of the stockholders and directors. As bearing upon this question of intention, the fact that no corporate meetings were held for five years after the by-laws were adopted is an important circumstance. It is claimed that the neglect to hold corporate meetings can have no bearing on this case, because it is not shown that complainant knew of this fact or was influenced by it, and we are referred to the case of New York Iron Mine *v.* Negaunee Bank, 39 Mich. at page 655, where some language of Mr. Justice Cooley to that effect is found. In that case the only question was whether the bank had been influenced to rely upon Wetmore's apparent authority, which did not in fact exist, to make the paper in question. The question is different here. It is not one of apparent power to do an act conceded to be fraudulent and void unless the corporation was estopped by its conduct to allege the fraud, but it is a question of actual power in Mr. Smith, as the president, treasurer and manager of this corporation, to perform an act entirely legal and proper if authorized. The intention to confer such power may be evidenced by their failure to act in opposition to or in restraint of a course of business they have themselves permitted, if not established. It is an ordinary occurrence for manufacturing or trading concerns, whose products have sometimes to be carried to await a favorable market, to draw against such products for the money needed to carry them; and, if requested, some form of security upon such products is given. If this be permissible shall the right to give security exist only so long as the goods are in stock, or may they be sold on credit and the accounts due for such sales be substituted with the consent of the creditor? If not, then trade is hampered, the debtor is put into the hands of the creditor, and the latter cannot release him if he would without risk. The right of Mr. Smith, as president and treasurer, to borrow money for the legitimate needs of the business and to give the company's paper is not contested. The duty to pay is involved in the power to incur debts. In the case of this corporation its power to pay its debts depended on the profitable sale of its products and the collection of the money due on such sales. If it could not otherwise dispose of its products it could turn them out to its creditors in payment of, or as security for, such debts. If its goods were sold on credit, these credits stood as the representatives of the goods, and the same use could legitimately be made of them. This is not like giving security upon all the corporate property, the enforcement of which may involve the corporate existence. The giving of the security or its enforcement did not necessarily interfere with the prosecution of the corporate business. It was given

seal of the company, there being evidence that the plaintiff had advanced to the corporation the amount for which the note was given, the Supreme Court of New York, in General Term, held that a finding that the corporation had executed the note in consideration of money loaned to it would not be disturbed.[1]

§ 160. Power of superintendents, etc.— A corporation will be bound by a contract made by its superintendent and manager

upon property and credits already devoted in equity and good conscience to the payment of its creditors, of whom the bank was one. The effect of it was simply to give complainant priority of lien." The court referred to the following cases to which it was cited, to wit: Kimball *v.* Cleveland, 4 Mich. 606; Joy *v.* Plank Road Co., 11 Mich. 155; Peninsular Bank *v.* Hanmer, 14 Mich. 208; Adams Mining Co. *v.* Senter, 26 Mich. 73; New York Iron Mine *v.* Negaunee Bank, 39 Mich. 644; Star Line *v.* Van Vliet, 43 Mich. 364; New York Iron Mine *v.* Citizens' Bank, 44 Mich. 357; Eureka Iron & Steel Works *v.* Bresnahan, 60 Mich. 332; Dwight *v.* Lumber Co., 67 Mich. 507; Delta Lumber Co. *v.* Williams, 73 Mich. 86; Genesee Co. Savings Bank *v.* Michigan Barge Co., 52 Mich. 438; Kendall *v.* Bishop, 76 Mich. 634; Stokes *v.* Pottery Co., 46 N. J. L. 237; Bank *v.* Bank, 48 N. J. L. 527; s. c., 7 Atl. Rep. 318; Fay *v.* Noble, 12 Cush. 1, as to the powers of agents of corporations in such matters. They said: "They are not altogether free from conflict, although if the exact point necessary to be decided in each case be kept in mind, and the language used be given no broader meaning than the facts of the particular case require, the conflict will be found more apparent than real."

[1] Jansen *v.* Otto Steitz New York Glass Letter Co., (1888) 49 Hun, 606; s. c., 1 N. Y. Supp. 605. Daniels, J., for the court, said: "To obtain money in this manner, to meet its financial necessities, was strictly within its authority as a corporation, and it was equally within its power, after having obtained it, to execute and deliver the note which was the subject of the action for payment of the amount. It is true that it was not subscribed by the president, as contracts were authorized to be made by article 7 of the by-laws; but while the president did not subscribe the note, his conduct authenticating its subscription, in the name of the company, was equal to what was in this manner provided for, inasmuch as he directed the note to be made by the secretary. These persons were vested with the apparent authority for conducting and carrying on the business of the company. And even though they may have omitted literally to comply with the by-laws, as to the form of the contract for the payment of the money, the company itself cannot be shielded from liability on account of that omission of its controlling officers. The case in all its features differs from that of Bank *v.* Church, 39 Hun, 498, where the note was neither sanctioned by the corporation, nor given by the officers conjointly required to act in the transaction of its business. The present note was the act of the officers, conjointly, of a business corporation empowered to borrow money and provide for its payment, substantially the same as that might be done by an unincorporated partnership."

relating to the ordinary concerns of its business.[1] It may be shown by the testimony of any one who knows the fact that one is the general manager of a corporation.[2] A corporation which has authorized its agents to sign "all notes and business paper," will be liable on accommodation notes given by him in the name of the corporation to a *bona fide* holder, taking them in good faith, for value before maturity, notwithstanding any want of authority of the agent to execute them for the purposes for which they were given.[3] The business manager of a manufacturing corporation cannot be assumed, as a matter of law, to have implied authority to agree, in behalf of the corporation, to pay for medical attendance, however small the sum, on one whom he has reasonable ground to believe to have been injured by the fault of the corporation.[4] An engineer employed by a railroad corpora-

[1] Whitaker *v.* Kilroy, (1888) 70 Mich. 635; s. c., 38 N. W. Rep. 606.

[2] Corning *v.* Walker, 14 N. Y. Wkly. Dig. 314. In Negley *v.* Counting Room Company, (City Ct. N. Y. 1886) 1 N. Y. St. Repr. 299, the evidence that the agent of a corporation signing a promissory note as "manager," "had mostly the entire charge of the business," has been held sufficient to show that his act in executing the note was within the scope of the general powers conferred upon him, and incidental to, and necessary for, the conduct of the corporation's business. Citing Farmers' Bank of Bucks County *v.* McKee, 2 Pa. St. 318.

[3] Bird *v.* Daggett, (1867) 97 Mass. 494.

[4] Swazey *v.* Union Manufacturing Co., 42 Conn. 559. As to the power of an officer of a corporation authorized to draw checks and drafts, and charged with the general management of the business of the corporation, in the absence of contrary instructions by the board of directors to bind the corporation by notes given for moneys used to pay off indebtedness of the corporation, which was a railroad corporation, in the construction of its road, see Fitzgerald & Mallory Construction Co. *v.* Fitzgerald, (1890) 137 U. S. 98; s. c., 11 Sup. Ct. Rep. 36. Cases as to the power of a president of a corporation growing out of his being, in the management of its affairs, its managing officer. Siebe *v.* Joshua Hendy Machine Works, 86 Cal. 390; s. c., 25 Pac. Rep. 14; Lancaster County *v.* Cheraw & C. R. R. Co., 28 S. C. 134; s. c., 5 S. E. Rep. 338; Kenton Insurance Co. *v.* Bowman, 84 Ky. 430; s. c., 1 S. W. Rep. 717; Marlatt *v.* Levee Steam Cotton Press Co., 10 La. 583; s. c., 29 Am. Dec. 468; Topeka Primary Assn. *v.* Martin, 39 Kans. 750; s. c., 18 Pac. Rep. 941; Bambrick *v.* Campbell, 37 Mo. App. 460; Grafius *v.* Land Company, 3 Phil. 447; Ceeder *v.* H. M. Loud & Sons Lumber Co., 86 Mich. 541; s. c., 49 N. W. Rep. 575; 24 Am. St. Rep. 134; Chicago, etc., R. R. Co. *v.* Coleman, 18 Ill. 297; s. c., 68 Am. Dec. 544; Steamboat Company *v.* McCutcheon, 13 Pa. St. 13; Smith *v.* Smith, 62 Ill. 493; Richmond, etc., R. R. Co. *v.* Snead, 19 Gratt. 354; s. c., 100 Am. Dec. 670; Dougherty *v.* Hunter, 54 Pa. St. 380; Moser *v.* Kreigh, 49 Ill. 86; Chicago, etc., R. R. Co. *v.* Boone Co., 44 Ill. 247; Voris *v.* Renshaw, 49 Ill. 425.

tion, by virtue of his position, has no power to bind the corporation by his contracts.[1] To bind the corporation special authority to the engineer must be shown.[2] The secretary of a corporation has no authority to give a memorandum of indebtedness of the corporation, and such a memorandum would not be negotiable.[3] The unauthorized execution of a promissory note by the secretary of a corporation for money borrowed, may be ratified by the board of directors of the corporation authorized by its by-laws to borrow money and execute securities therefor, and the corporation be bound by such ratification.[4] It is in the power of the supervising agent of a corporation, made by its charter its executive officer, having the care and management of its business under the direction of the general board of directors, to accept a draft for the corporation where there is no restriction upon the general powers conferred upon him.[5]

§ 161. **A manager's power.**— In a case where one as manager of a corporation, to which position he had been duly appointed, negotiated a loan with another, and gave the latter his note for the amount payable to the order of the corporation, which note was indorsed by him as such manager, and as collateral security for its payment he delivered with the note mortgage bonds of the corporation, the New York Court of Appeals said the evidence "was sufficient to permit the court to submit, as it did to the jury, the question whether the debt, to recover which this action was brought, was that of the company." The court below was requested to charge that before a verdict could be found for the plaintiff the jury must be satisfied by affirmative proof that the manager was authorized to indorse the name of the company on the note by prior resolution of the executive committee or by the board of directors or by ratification, by resolution or some equivalent act of such committee or bond. The court held that there was no error in the charge, which substantially was that the jury, to reach such result, must find either

[1] Gardner *v.* B. & M. R. R. Co., 70 Me. 181.

[2] Ibid.

[3] Sears *v.* Trustees Illinois Wesleyan University, (1862) 28 Ill. 183.

[4] Nebraska & K. Farm Loan Co. *v.* Bell, 58 Fed. Rep. 326; s. c., 7 C. C. A. 253.

[5] Hascall *v.* Life Association of America, 5 Hun, 151. As to the power of a superintendent of a corporation operating in a foreign country, see Rathbun *v.* Snow, (1890) 123 N. Y. 343.

prior authority or subsequent ratification, and that it could be evidenced by general course of business as well as by resolution.[1]

§ 162. **Manager of a foreign incorporation.**— Certain notes were signed by the president of a construction company, an Iowa corporation, and certain others by an auditor of the corporation, payable to the order of certain banks, and indorsed by one who was appointed a manager for the construction company in its work of constructing railways in Nebraska. Upon these notes the latter realized money through the banks and used it in payment of bills of the construction company for labor, etc., on their work of construction. When the notes became due this manager in Nebraska arranged or paid off the notes as indorser, and they were assigned over to him. He brought action upon them against the company in the Nebraska courts, and the foreign corporation defendant had the cases removed to the federal courts. When the case came before the Supreme Court of the United States, in the opinion rendered, FULLER, Ch. J., for the court, said of the evidence, that it "tended to show that Mallory [the president of the construction company] was authorized to build the line of [several railroad companies], being a distance in the aggregate of about six hundred miles of railroad, and which cost some seven millions of dollars; that he had full charge of the location and construction of the road; that he was authorized to draw checks and drafts, and all these notes and drafts were made, accepted or authorized by him; that the directors not only did not give contrary instructions in the first instance, but knew of the giving of the notes and drafts, and did not disaffirm the action of the president, and that the proceeds were used for the payment of construction liabilities of the company in every instance, either directly or in taking up paper, the proceeds of which had been so used." The argument before the court was

[1] Huntington *v.* Attrill, (1890) 118 N. Y. 365; s. c., 23 N. E. Rep. 544. In Deller *v.* Staten Island Athletic Club, (1890) 56 Hun, 647; s. c., 9 N. Y. Supp. 876, it was held that where the board of management of a corporation like defendant was authorized by the by-laws to make necessary contracts and regulations, and the officers of the club, acting under a resolution of the board of management, contracted to lease the club house to plaintiff, who agreed to maintain a restaurant for the exclusive use of the members and their guests, subject to the approval of the house committee, plaintiff might recover for refreshments furnished to guests of the club at the request of members of the house committee.

that there could be no recovery on the notes and drafts in question, because it was said they were made by the president or auditor of the company without the knowledge or consent of the board of directors; and, further, that the notes in the first two causes of action named were paid by the plaintiff when he was under no obligation to pay, and then and in that respect was a mere volunteer. The Supreme Court of the United States held that the instructions to the jury in this case were justified by the evidence.[1]

[1] Fitzgerald & Mallory Construction Co. *v.* Fitzgerald, (1890) 137 U. S. 98; s. c., 11 Sup. Ct. Rep. 36. The instructions of the United States Circuit Court in this case to the jury were as follows: "That if they found from the evidence that the president was given entire management in building the railroad, and in the incurring of liabilities and paying of debts incurred therein, he might appoint other agents, such as a cashier and auditor, for the purpose of making the calculations on pay-rolls and on contracts for building the road, and might empower any one of such agents who made such calculations upon the pay-rolls of the amount due to those who did the work by contract or otherwise, to draw any checks or bills or sight drafts necessary to pay the same, and 'if it becomes necessary for the benefit of said company to execute promissory notes or to draw sight drafts, the said president would have ample authority to do the same, and might likewise empower the cashier, or the party whose duty it was to ascertain the amounts due to contractors, materialmen and persons working upon the construction or building of said railroad by the construction company, to draw drafts or checks, or even make promissory notes, and that the same, if done for the company or for its use and benefit, would be binding upon the said company, unless the president received from the directors certain instructions which limited his authority in the premises.'" The court also instructed the jury: "As to the promissory notes which were indorsed by the plaintiff, and upon which he was held as indorsee, if the jury found from the evidence that said notes were executed in good faith for the president of the construction company, and that the proceeds, or the proceeds of the notes and drafts of which the notes in question were renewals, were received by and used for the benefit of the construction company, and you further find that the plaintiff is not the holder and owner of said notes, you will find for the plaintiff in the full sum of the notes, with interest." And further: "And although there may be a provision in the by-laws of said construction company requiring certain formalities in the execution of a promissory note or draft, yet that does not necessarily make such formalities essential to the ratification of the contract; but if you find from this evidence that said notes were given for the purpose of paying off debts that were due by said construction company, and that the directors of said construction company had full knowledge of the same and assented to this transaction, to the signing and execution of the notes, you will find that said acts of the president have been fully confirmed, and you will find for the plaintiff the full amount of said notes, with interest, provided you find

§ 163. **Authority of a manager.**— One, a physician, managing a medicine company, a corporation organized under the laws of New Jersey, who had been intrusted with the management so far as the collection of debts due to it and payment of debts due by it, had placed in a bank for collection certain checks payable to the order of the corporation, indorsed in the name of the corporation by himself. The total amount of the collections were paid to him by the bank, and it appeared that a part of the sum he failed to pay over to the corporation or on its account. The corporation brought action against the bank for this balance, denying the authority of this person to indorse, etc., the paper

the plaintiff was the owner of the same, and is now the lawful holder of them." It was said by the Supreme Court on the merits of the case: "If the moneys were used to pay off indebtedness of the company arising in the construction of the road, and for work done under proper authority, the transactions were in pursuance of the authorized purposes of the corporation, and occurred in its legitimate business. The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions if they wished to withdraw the general management from its president, and to disaffirm the action of their agents promptly and at will, if they objected to it. Indianapolis Rolling Mill *v.* St. Louis, etc., R. R. Co., 120 U. S. 256; Cresswell *v.* Lanahan, 101 U. S. 347. The company was liable upon the original indebtedness, and its change of form in order to relieve the pressure of the creditors was by the direction, with the participation, and the request of, the president. We perceive no want of power and no omission of essential formalities in what was done. Another mere fact that [the plaintiff] was a stockholder in and a promoter and director of the company, and, with the president, the manager of the work in the prosecution of which the indebtedness arose, would not change the binding character of the obligation. Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587; Gardner *v.* Butler, 30 N. J. Eq. 702, 721; Harts *v.* Brown, 77 Ill. 226; Again, there was evidence to the effect that [the plaintiff] indorsed the notes at the request of the president. Inasmuch as the defendant was answerable for the indebtedness which the money received upon the notes went to pay, if in order to obtain that money [the plaintiff] was called on to indorse the notes, and compelled to protect his indorsement, he could not be treated as a volunteer. There would be no element in such a transaction of the voluntary payment by one of another's debt. So, if [the plaintiff] was the manager of the work under the president, and the money was used to pay off the sub-contractor, materialmen and hands, then, upon the refusal of the company to repay, [the plaintiff] had the right to take up the notes and have them assigned to him; and whether he was the owner and holder of the notes was left to the determination of the jury. By the first section of the by-laws, the officers of the company were declared to be 'a' president, vice-president, secretary and treasurer, and such other officers as may be deemed necessary to carry out the object of the articles of this incorporation.".

belonging to the company, and claiming that such authority was only in its treasurer. The trial court refused the request of the bank on the trial to instruct "that if the jury shall find that by the consent of the [corporation this person] had conducted the plaintiff's business, had paid bills, sold goods, received and paid out moneys for the [corporation], and was in fact ostensibly in charge of the business, then [he] had apparent authority to indorse the drafts in question and receive the money in question, and it was immaterial whether or not he had actual authority." The Supreme Court of New York, in General Term, held that this refusal to instruct, as requested, was error, for, said they: "Corporations can act only through their officers and agents, and, if a person has been instructed by the officers to carry on the business, the acts of that person must be deemed to be binding upon the corporation in all cases where the parties dealing with him have not notice or knowledge of his want of actual authority."[1]

[1] Craig Medicine Co. *v.* Merchants' Bank of Rochester, (1891) 59 Hun, 561; s. c., 14 N. Y. Supp. 16. But the court considered another point a more radical reason for reversing this judgment, to wit: It appeared that the treasurer had been given a proxy by the other stockholders to represent them in the meeting to be held in New Jersey to organize the corporation and to vote for them. This he did, organizing the company, electing himself and the persons he represented as a board of directors, he only being present, and afterwards, in a meeting of its board of directors represented by himself alone, elected officers, including himself as treasurer. It was said as to the law applicable to this state of facts: "We know of no principle applicable to the discharge of corporate functions, by which directors or trustees of the corporation can vote at the meeting of the board of directors or trustees by proxy. Under the act of this state (Chapter 40, Laws of 1848) for the organization of companies for manufacturing, mining, mechanical or chemical purposes, stockholders may, at the meeting of the stockholders for the election of directors, vote when absent by giving a written proxy to some other person. This is also true of the statutes of New Jersey, put in evidence, but there is no law in New Jersey that permits a director to vote by proxy at board meetings. The general rule there, as in this state, and universally, is that it requires a quorum of directors or managers as trustees of a corporation to transact business, and that, in the absence of a statute making a different number such quorum, a majority of the whole board is required. The principal claim, therefore, made by the plaintiff, that it had a legally elected treasurer, who alone could transact business of the corporation of this character, cannot be maintained. The proxy or power of attorney, put in evidence, did not give [its holder] the right to vote in the name of the directors who should be chosen at the stockholders' meeting, and if it had, it would have been utterly void. It was not known, indeed, who the directors would be. Under the power of attorney [he] had

§ 164. What is not within the duties of a cashier of a corporation.— The Michigan Supreme Court has declared in a case before it that compromising claims, settling unliquidated damages, and releasing debts due to the corporation, are acts which do not come within the ordinary duties of a cashier, bookkeeper, or corresponding clerk.[1]

the right to elect other persons than those whom he did in fact designate as directors. In the absence, therefore, of a legally authorized treasurer, any person in the position of [the person here] who had general management of the business, or any director, as [the one who signed for him] is shown to be, had the power to indorse the corporation's name for the purpose of collecting commercial paper made payable to its order. The [bank], having acted in perfect good faith, has turned its collections over to the proper person representing the corporation. There being no treasurer by election of the directors, and none in fact by the usual conduct of the business, except the person acting for the [corporation] in this instance, it follows that the manager or any director of the corporation could, in the absence of a positive statute, sign the corporation name for the purposes of the collecting of commercial paper."

[1] Delta Lumber Co. *v.* Williams, (1888) 73 Mich. 86; s. c., 40 N. W. Rep. 940. *Arguendo,* the court said: "The statute authorizing the formation of corporations for manufacturing purposes enacts that the stock, property, affairs and business of every such corporation shall be managed by its board of directors. The board shall choose one of their number to be president, one to be vice-president, and also a secretary and treasurer. The office of cashier is not one that is named in the act, and although such corporations are authorized to elect, in such manner as they may determine, all necessary officers, and to prescribe their duties, yet no testimony in the case was introduced to show what the duties of the cashier were defined to be. In banking institutions the authority of a cashier has become pretty well defined by common usage. He is considered the executive officer through whom and by whom the whole moneyed operations of the bank in paying or receiving debts, or discharging or transferring securities, are to be conducted. Ang. & A. Corp. § 299. But his authority does not extend so far as to justify him in altering the nature of the debt, or changing the relation of the bank from that of a creditor to that of an agent of its debtor. And an agreement by the president and cashier of a bank, that an indorser shall not be liable on his indorsements, is not binding on the bank. Bank *v.* Dunn, 6 Pet. 51; Bank *v.* Jones, 8 Pet. 16. In the absence of anything in the charter or by-laws of the corporation known as the 'Delta Lumber Company' defining the duties of the cashier of such corporation, and in the absence of any showing as to the usage of this company, or of manufacturing corporations in this state, by which the duties of a cashier may be inferred, we cannot ascribe to him greater powers as an agent of the corporation than would pertain to the agent of a banking corporation. He may be considered the executive officer of the financial operations of the corporation; and whether he would, in an emergency, be considered as authorized to sell and convert the personal property of the corporation into money to meet its obligations, need

§ 165. **Auditing board of a corporation.**— In the absence of any proof of authority conferred upon an auditing board of a manufacturing corporation of New York, beyond the usual functions of such a board to allow or reject claims, such an auditing board, it has been held, had no authority to rescind a contract which it was claimed in the action against the corporation had been made with a licensor by its president representing the corporation, the licensee of a patented article used in its business, or determine the future action of the corporation, but that such authority was in the trustees of the corporation.[1]

§ 166. **Power of a treasurer generally.**— Title will pass by a sale made by the treasurer of a corporation, without special authority, where he has been in the habit of transacting such business with the knowledge and sanction of the managing board of the corporation.[2] The authority of a treasurer of a corporation to bind it by the acceptance of a draft, may be inferred from the knowledge and acquiescence of the directors.[3] An attorney may be employed by the treasurer of a corporation without any special authorization of the board of directors.[4] A treasurer of a corporation must have special authority, it not being within the general power and province of such officer, to issue written admissions, which would bind the corporation, of the amount due upon a disputed claim for salary of other agents of similar grade; the power to fix such amounts belongs regularly to the board of directors.[5] The treasurer of a manufacturing corporation has no authority to release a claim for a loss under a policy of insurance obtained by him in behalf of the corporation.[6] A treasurer of a corporation is not authorized to pay a claim of his own against the corporation where it has not been approved and its payment

not now be determined, as certain it is that he would have no authority, as such cashier or general financial agent, to give away the property of the corporation or change its relation with its debtor by releasing a debt due to it, without express authorization. Bank *v.* Dunn, 6 Pet. 51; Kirk *v.* Bell, 12 Eng. Law & Eq. 389; Hoyt *v.* Thompson, 5 N. Y. 320."

[1] Skinner *v.* Walter A. Wood Mowing & Reaping Machine Co., (1893) 140 N. Y. 217.

[2] Phillips *v.* Campbell, 43 N. Y. 271.

[3] Partridge *v.* Badger, 25 Barb. 146.

[4] Turner *v.* Chillicothe & Des Moines R. R. Co., (1873) 51 Mo. 501.

[5] Kalamazoo Novelty Manufacturing Co. *v.* McAlister, 36 Mich. 327.

[6] E. Carver Co. *v.* Manufacturers' Insurance Co., (1856) 6 Gray, 214.

authorized by the corporation.[1] On a debt being paid to the treasurer of a corporation he has no power to assign the security without direction from the board of directors.[2] A vote of the directors of a corporation authorizing its treasurer to hire money on such terms and conditions as he may think most conducive to the interests of the corporation to meet certain of the acceptances by him of the drafts of the corporation upon him, carries with it authority to indorse drafts drawn by himself to accomplish the object.[3] Mere lapse of time will not destroy the official character of the last secretary of a corporation so as to prevent his releasing a mortgage given to the corporation.[4] In a case where the authority of a treasurer of a corporation to sell material or products of the same was questioned, and one of the by-laws of the corporation was put in evidence providing that the treasurer "should discharge the duties usually and customarily pertaining to" this officer and other testimony that witness was familiar with the duties of cordage and other manufacturing corporations at the place where the contract was executed and where this particular corporation was located, and that they were accustomed to buy and sell merchandise and to sign and accept contracts such as was made in this case, it was held by the United States Circuit Court of Appeals that the authority of the treasurer to bind the corporation by this contract was one for the jury.[5]

§ 167. **Power of a treasurer as to transfer of a note.**— In the absence of evidence of authority, the title to a note will not pass by the indorsement of the treasurer of a corporation in his official capacity.[6] A treasurer of a corporation being intrusted by it to take notes, an indorsement by him will bind the corpora-

[1] Peterborough Railroad *v.* Wood, 61 N. H. 418.

[2] Ballou *v.* Campbell, 5 Wend. 572.

[3] Belknap *v.* Davis, 19 Me. 455.

[4] Kimball *v.* Goodburn, 32 Mich. 10.

[5] National Cordage Co. *v.* Pearson Cordage Co., 55 Fed. Rep. 812; s. c., 5 C. C. A. 276. In Ellis *v.* Howe Machine Co., 9 Daly, 78, it was held that the treasurer of the sewing machine company, owning with his brother, the president of the company, nearly the entire capital, had power to bind the corporation by a contract for a statue to be used as an advertisement of its business; that the concurrence in such case of the whole or of the majority of the board of directors was not essential. As to the power of a treasurer of a corporation, see Columbia Bank *v.* Gospel Tabernacle Church, (1889) 57 N. Y. Super. Ct. 149. As to the power of a treasurer of a lumber, ranch and mining company, see Rumbough *v.* Southern Improvement Co., (1893) 112 N. C. 751.

[6] Knight *v.* Lang, 4 E. D. Smith, 381; s. c., 2 Abb. Pr. 227.

tion, his authority to indorse them being implied from his being treasurer and being intrusted with the securities, and that they are made payable to the treasurer, or to him as treasurer.[1] In case the directors of a corporation by vote authorize its treasurer to indorse notes of the corporation to a third person, or such treasurer be suffered to draw and accept drafts, to indorse notes payable to the corporation, and to do other similar acts whereby he is held out to the public as having the general authority implied from his official name and character, an indorsement of a note made in pursuance of such express or implied authority would pass a valid title to the indorsee.[2]

§ 168. Power of a treasurer as to execution of a note.— A treasurer of a corporation may be given authority by a corporation by parol to execute a promissory note in its name.[3] Where a treasurer of a corporation has been authorized to give the note of a corporation in payment of a corporate debt, he may do so after the lapse of several years, provided the debt is not barred by the Statute of Limitations.[4] The authority to execute a note of a corporation in an officer of the same may exist under a by-law of the corporation, or be based upon its custom in such matters. If its custom is to permit its treasurer to execute its promissory notes, the corporation will be bound by a note executed by such treasurer, especially where it receives the benefit of the money loaned upon the notes.[5] The board of directors of a

[1] Perkins *v.* Bradley, 24 Vt. 66.

[2] Lester *v.* Webb, (1861) 1 Allen, 34.

[3] Odd Fellows *v.* First National Bank of Sturgis, 42 Mich. 461; s. c., 4 N. W. Rep. 158.

[4] Hayward *v.* Pilgrim Society, (1838) 21 Pick. 270.

[5] Foster *v.* Ohio-Colorado Reduction & Mining Co., (1883) 17 Fed. Rep. 130. McCrary, J., in this case charged the jury in these words: "Upon the first question, as to whether this is the note of the defendant corporation, that is to be determined upon the question whether the person who executed the note on behalf of the corporation, * * * the treasurer of the company, was authorized to execute such an instrument. The law upon this subject is that the authority is not presumed from the mere fact that the person assumed the right to give a note in the name of the corporation. A corporation is an artificial person, which must act within certain limits. It differs from a natural person. If an individual gives his note, it is not necessary to prove anything in the way of authority, but a corporation must act by way of agents, and the authority of the agent who acts for it is not presumed. It may, however, be shown, either by showing an express authority, as, for example, a resolution of the board of trustees authorizing a certain party to execute a note on behalf of the corporation, or by a provision of the constitution or by-laws of the cor-

construction company authorized the officers of the company to execute a note for nine thousand dollars and a chattel mortgage upon the rolling stock of the company to secure the payment of the same. The officers executed the note and mortgage and stipulated therein for attorney's fees in case of suit for the collection of the same. In a suit to foreclose the mortgage, a District Court of Iowa refused to allow attorney's fees. Upon an appeal, the Supreme Court said as to this matter: "This was an explicit direction to execute a note for nine thousand dollars and interest, and no more. The company did not, by any official action, authorize the execution of a note in any amount exceeding said sum in any event. We think the court correctly held that the measure of liability was nine thousand dollars and interest."[1] It is not within the ordinary powers of the treasurer of a corporation, acting as its financial agent, to give the note of the corporation for the debt of a third person; neither is it within the ordinary powers of the directors of a corporation, unless there is an urgent necessity to do so to subserve the interests of the corporation.[2]

§ 169. Authority of a treasurer to borrow money by means of sterling contracts.— In a federal court case the action was *assumpsit* for breach of contract by a railroad company in not placing in the hands of the drawers of a foreign bill of exchange money to meet it when matured. The company's

poration authorizing a certain officer to execute promissory notes. It might be shown in that way, but I believe it is not claimed that there is anything of this kind here. It may also be shown by the course of dealings of the corporation and by facts and circumstances which are sufficient, in the judgment of the jury, to show that the party who executed the note had the authority. If it was the custom of this corporation to permit the treasurer to execute its promissory notes, and if he was in the habit of doing so, with the knowledge of the trustees, or of the corporation — which means, of course, the trustees — they had, by recognizing that custom and acting upon it, themselves become bound by it, and, especially, if they received the benefits of transactions of this sort, which they permitted the treasurer to enter into."

[1] Hardin *v.* Construction Co., 78 Iowa, 729; s. c., 43 N. W. Rep. 543. See, also, Pacific R. M. *v.* Dayton, S. & G. R. Ry. Co., 5 Fed. Rep. 852; s. c., 7 Sawy. 61; Schallard *v.* Eel River Steam Navigation Co., (1886) 70 Cal. 144; s. c., 11 Pac. Rep. 590. For a case showing under what circumstances the signing of a note by the treasurer of a corporation was unauthorized, see Medberry *v.* Short, 15 N. Y. Wkly. Dig. 227.

[2] Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144.

treasurer had borrowed money by the purchase of a foreign bill of exchange and entered into the contract signing the name of the corporation by himself "Treasurer." The question in the case was whether he had authority to bind the corporation in this way. The insistment of the plaintiff was that such authority was to be found in the by-laws of the corporation. COLT, J., in his opinion, recites the by-law's provision that the treasurer "shall collect and receive all assessments, incomes and moneys that may be due to the corporation, and disburse the same as the board of directors may order; he shall surrender notes and other promissory papers on payment thereof, and discharge such mortgages as may have been given securing the same; he shall keep a regular set of books, containing the accounts of the corporation, and of all its funds that may pass through his hands; *and shall lay before the directors monthly a written statement of all notes, drafts, promises, contracts made, signed, indorsed or surrendered by him*, an abstract of all moneys received and paid by him, and a statement of all property bought or sold, and of such other matters as the directors may deem important." He then said: "The fact that this by-law directs the treasurer to lay before the directors monthly a written statement of all notes, drafts, promises and contracts signed or indorsed by him does not, I think, confer upon him the authority to do these acts without their direction or approval. To confer such broad and general powers on the treasurer of a corporation is certainly unusual. The court should not hold that such authority is vested in a treasurer by implication from the language of a by-law, but the by-law should expressly give such authority, if it was intended to be so conferred."[1]

[1] Page *v.* Fall River, W. & P. R. Co., (1887) 31 Fed. Rep. 257, 258, 259. The defendant called several officers of different railroads, who testified that, in their experience, they never knew railroads to borrow money upon such contracts as this; also two presidents and one cashier of Boston banks were called, who testified, in substance, that to their knowledge such contracts were not an ordinary and usual method of borrowing money, and that they had never known of the loan of money on such contracts. On the other hand, the plaintiff introduced evidence that at the time of this transaction the borrowing of money by means of sterling contracts similar to the one now in controversy was a usual and ordinary way of borrowing money in Boston among houses having foreign capital to loan, by persons not importers or requiring to use money abroad. Upon this the court said: "It may be true that to ordinary bankers this way of borrowing money

§ 170. Power of a treasurer to indorse in name of corporation a note for accommodation.— It has been held in one of the courts of New York that a negotiable note indorsed in the name of a manufacturing corporation by its treasurer for the

was unusual or unknown, but to bankers having foreign funds it seems to have been a common mode. To bankers like these plaintiffs there would be nothing unusual or calculated to excite suspicion for any one desiring a loan to apply to them, and for them to make it in such form as was most convenient to them at the time. There is no proof that [the treasurer] suggested the form the loan should take. The inference rather would be that he applied to the plaintiffs, and they suggested the mode adopted. The fact that it was not customary for railroads to borrow money in this way was not sufficient to put the plaintiffs upon their guard. or to excite suspicion of irregularity. The plaintiffs were lenders of foreign money in the Boston market. They were applied to by one who was a customary borrower of home capital from other parties, and whose notes were bought by institutions not only in this state, but out of it. Why should they not loan their funds, under these circumstances, in a manner not unusual with them and bankers of their class? If the defendant had desired to restrict its treasurer to borrowing money from [one certain bank] or through [certain parties] or to the form of borrowing by promissory notes, it could have done so by formal and proper action on the part of the directors. In the absence of any such restriction the defendant must be held liable. When the authority of the agent is left to be inferred by the public from powers usually exercised by the agent, it is enough if the transaction in question involves the same general powers though applied to a new subject-matter. Merchants' Bank *v.* State Bank, 10 Wall. 604. 'It is not necessary in order to constitute a general agent, that he should have done an act the same in specie with that in question. If he has usually done things of the same general character and effect, and with the assent of his principals, that is enough.'" COWEN, J., in Commercial Bank of Erie *v.* Norton, 1 Hill, 501, 503. The right to recover in this case rested mainly on the ground of an implied authority on the part of the treasurer to make this contract, because the corporation held him out to the world as its general fiscal agent authorized to negotiate loans, borrow money, make notes and manage its whole financial business. The court said: "The legal principle relied upon by the plaintiff is well stated in Lester *v.* Webb, 1 Allen, 34: 'The rule is well settled that if a corporation permit the treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority.' See, also, Merchants' Bank *v.* State Bank, 10 Wall. 604; Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192." Upon the facts in this particular case the court then considered the questions, whether the directors by their course of conduct, held the treasurer out to the public as the fiscal agent of the corporation, having authority to make and indorse notes for the cor-

accommodation of the maker could not be enforced against the corporation where the note did not concern any business of the corporation and there was no by-law or resolution authorizing the treasurer to indorse negotiable paper or any proof of a recognized course of business by which the treasurer was held out as possessing such power, or any evidence that the corporation had ratified the act or derived any benefit from it though the note was in the hands of a *bona fide* holder.[1]

§ 171. Power of a treasurer to indorse note of another corporation.— A trading corporation sought in an action to recover of a former treasurer the amount of money it had been compelled to pay on account of an indorsement in its name made upon a note of another corporation, contending that the indorsement was an act *ultra vires* the trading corporation. It appeared that the defendant at the time of indorsing the note in question, and for five years prior thereto, was the treasurer and general manager of the plaintiff. As such general manager he was allowed to exercise his discretion in managing plaintiff's business. During all the years that he was plaintiff's manager the

poration, and, if so, whether there was anything so unusual in this transaction as to have put the plaintiffs on their inquiry. COLT, J., said: "I have no doubt that the directors by allowing [the treasurer] for several years and for a large amount to sign notes for the corporation, most of which were sold to different banks in the state and some out of it — some of the directors going so far in recognition of [his] authority as to indorse the notes — conferred upon him, so far as the public is concerned, an implied power to borrow money, which the corporation cannot now dispute. As to the nature of this transaction, I am unable to conclude that it was of such an extraordinary character as to relieve the defendant."

[1] Wahlig *v.* Standard Pump Mfg. Co., (N. Y. City Ct. Spl. Term, 1890) 9 N. Y. Supp. 739. "The act of the treasurer" (the corporation receiving no benefit from the note, and the proceeds never reaching its treasury), said MCADAM, Ch. J., "under these circumstances, was not a corporate act." Wahlig *v.* Manufacturing Co., (N. Y. City Ct. Gen. T., 1890) 5 N. Y. Supp. 420; Mather *v.* Trust Co., (N. Y. City Ct. Spl. Term, 1890) 7 N. Y. Supp. 213; Westerfield *v.* Radde, 7 Daly 326; S. C., 55 How. Pr. 369. "[This] treasurer had no power to lend the credit of the corporation. If the indorsement was not a corporate act, the fact that the plaintiff was a *bona fide* holder cannot even under Mechanics', etc., Assn. *v.* New York, etc., Lead Co., 35 N. Y. 505, make it a corporate charge. In such a case the remedy would seem to be against the treasurer who acted without corporate sanction, (Green's Brice Ultra Vires, 634) upon the theory that, where the act does not bind the principal, it binds the person who, without authority, assumed to act as agent."

plaintiff's board of directors left the direction and management of the business to his judgment and habitually held no meetings except an annual meeting. The plaintiff was organized as a corporation under the laws of Connecticut for the purpose of manufacturing and dealing in certain classes of goods, and to exercise such mercantile powers as might be convenient and necessary for the prosecution of its particular business. It had been the practice of the plaintiff to extend financial assistance to parties with whom it had business relations. The whole management of its business was, in fact, intrusted to this treasurer. He made a contract with a carbon manufacturing company upon behalf of his corporation by the terms of which the latter was to receive and sell the greater part of the carbon manufactured by the former company upon certain terms, etc. For the purpose of increasing its manufacture of carbon, the carbon company applied to the treasurer, as representing the trading corporation, for assistance, and made its promissory note for $10,000, payable to the order of the corporation, which note the treasurer in the corporation's name indorsed and procured to be discounted, and handed over the proceeds to the carbon manufacturing company. The Supreme Court held adversely to the claim of the corporation that this note was an accommodation indorsement by its treasurer, and, therefore, *ultra vires*.[1]

[1] Holmes, Booth & Haydens *v.* Willard, (1889) 53 Hun, 629; 5 N. Y. Supp. 610. VAN BRUNT, P. J., for the court, said: "The transaction as it took place between the carbon company and the defendant, representing the plaintiff, was simply a loan of money. The carbon company gave its note, payable to the order of the plaintiff, and the plaintiff loaned the money upon the note. How it got the money was immaterial, whether by having the note discounted upon its own credit, or otherwise, does not alter the relations of the parties. It was a loan made between the plaintiff and the carbon company, by and through its treasurer, and there is nothing in the case going to show that there was any accommodation indorsement, or anything of that sort. The question raised here, therefore, is whether a loan of money by a corporation is *ultra vires*. We have not been referred to any authority or principle, under which such a transaction can be held *ultra vires* of a corporation, particularly a trading corporation which has the right to exercise such mercantile powers as may be convenient and necessary for the successful transaction of its business, which clearly gives it the authority to extend mercantile facilities to the persons dealing with it if in its judgment it thinks it for the benefit of its business so to do. The transaction, therefore, between the plaintiff and the carbon company was in no respect *ultra vires*. As to the power of the treasurer of the corporation to use its credit and money in such a way, it was said: "It is suffi-

§ 172. When a corporation will be bound by a note executed by its treasurer.—In a case where a bank discounted a note for a private corporation "in the usual course of its business without notice of any defect or infirmity," and its good faith was not questioned, the Supreme Court of Massachusetts held that if the note was signed by an officer authorized generally to give notes in its behalf the corporation would be liable, although the agent in signing this particular note exceeded his authority or the powers of the corporation.[1]

cient to say that the evidence shows conclusively that it had been the practice of this corporation to lend money and extend financial assistance to parties with whom it had business relations. It is true that it is claimed that the only evidence of any such course is that the defendant during his administration often gave financial assistance to customers by him, but that such acts were not reported to the board of directors. But the evidence fails to establish this proposition. It is true that the subsequent treasurer says that such accommodations were not extended to any but the customers by him, but there is no evidence but that it had been the practice prior to this time to give financial assistance to others than customers strictly speaking, in the shape of extending their paper as is claimed to have been only done by [the last treasurer]. And it appears without contradiction that it was not customary for the board of directors to give the manager directions in these matters; that he always exercised the authority, and it was not customary to bring it before the board of directors. In other words, the whole details of the management of the corporation were, as above stated, committed to the general manager. Under this state of things, it is difficult to see how the defendant can be held liable, because of his action, in conducting the business in precisely the same way in which it had heretofore been done, and extending aid to persons with whom the plaintiff had dealings. If corporations choose to place the whole of the management of their business for the purpose of expedition in the hands of a single individual, and give him a general authority to act as under the circumstances may seem best to him, unless absolute fraud is shown on his part, there seems to be no ground upon which a right of recovery can be had against him for any such acts. Certainly a mere mistake in judgment does not render him liable. Trading corporations are necessarily managed in a more informal way than those of a different character. They are voluntary copartnerships, having a right of survivorship, not dissolved by reason of the death of any one of the parties in interest, and a director or officer or manager, with whom is intrusted all the business of the corporation, can exercise all the powers which the board of directors could exercise under the same circumstances in the general management of the corporation business. Hoyt *v.* Thompson, 19 N. Y. 209. Even if we concede that the corporation had no power to lend its money, yet, when it is found that it had been in the habit of so doing, and that it had been the course of business of the corporation, certainly an officer cannot be held liable simply because he has continued the practice."

[1] Merchants' Nat. Bank of Gardiner *v.* Citizens' Gas Light Co. of Quincy, (1893) 159 Mass. 505; s. c., 34 N. E.

§ 173. When a corporation is bound by acts of treasurer. — In a recent case before it the Supreme Court of New York, in General Term, has held that where the treasurer of a business corporation was also permitted to become and act as its sole financial manager, the corporation would be chargeable, irrespective of the question of authority, in fact, with liability for acts done by him within the apparent scope of the authority conferred

Rep. 1083, citing Monument Nat. Bank *v.* Globe Works, 101 Mass. 57. BARKER, J., for the majority of the court, said, *arguendo*: "It is not necessary that the authority of an officer or agent to sign notes in behalf of a corporation should appear in the by-laws, or should have been expressly given by a vote of the directors or of the stockholders. In Lester *v.* Webb, 1 Allen, 34, it was said: 'The rule is well settled that if a corporation permit their treasurer to act as their general fiscal agent and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority. Fay *v.* Noble, 12 Cush. 1; Williams *v.* Cheney, 3 Gray, 215; Conver *v.* Insurance Co., 1 N. Y. 290. On the facts found at the trial the plaintiff might well claim, if the jury believed the evidence, that the treasurer had authority to indorse the notes in suit, derived, not from any express direction, but from the course of conduct and dealing of the treasurer with the knowledge and implied assent of the directors of the corporation.'" See, also, McNeil *v.* Chamber of Commerce, 154 Mass. 285; s. c., 28 N. E. Rep. 245; Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192. "But," said the Massachusetts court, "cases where the actual authority of an officer is inferred from a course of business known to and permitted by the stockholders or directors of a corporation, do not touch the question whether authority is to be implied as matter of law from the name and nature of the office itself. In the present case the jury were instructed that the treasurer of such a corporation as the defendant company has, by virtue of his office, authority to sign a note which shall bind the corporation, and the defendant contends that this instruction was incorrect. The incidental powers of some officers or agents have become so well known and defined, and have been so frequently recognized by courts of justice, that certain powers are implied as matters of law in favor of third persons who deal with them on the assumption that they possess these powers, unless such persons are informed to the contrary. The officers and agents usually mentioned in this category are auctioneers, brokers, factors, cashiers of banks and masters of ships. See Merchants' Bank *v.* State Bank, 10 Wall. 604; Case *v.* Bank, 100 U. S. 446. Treasurers of towns or cities in this commonwealth are well-known officers, and their powers are very limited. They are in general to receive, keep and pay out money on the warrant of the proper officers of the towns and cities. Treasurers of business corporations usually have much more extensive powers, and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed, by virtue of his office, with power to act for the corporation in making, accepting, indorsing, issuing and negotiating promissory notes

upon him by the corporation. In this case, for instance, the treasurer of a water works company had been permitted, through the omission of its other officers to direct its financial management or supervise his acts, to become and act as its sole financial manager, and had made and negotiated some fifty promissory notes in its name during a period extending over about a year and a half. The court held that the company was liable to a *bona fide* holder for value of a promissory note executed in its name by such treasurer, which matured while he was still treasurer, and the proceeds of which, so far as received by him, had been applied to the use of the corporation, although the note was not specially authorized.[1]

and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper. Narragansett Bank *v.* Atlantic Silk Co., 3 Met. 282; Bates *v.* Iron Co., 7 Met. 224; Fay *v.* Noble, 12 Cush. 1; Lester *v.* Webb, 1 Allen, 34; Bank *v.* Winchester, 8 Allen, 109; Bird *v.* Daggett, 97 Mass. 494; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; Corcoran *v.* Cattle Co., 151 Mass. 74; s. c., 23 N. E. Rep. 727. While it is possible that most, if not all, of the cases in which this rule has been stated as law have some special circumstances from which the treasurer's authority could be inferred, and that the court was influenced in the decisions by the well-known fact that in many of the manufacturing corporations of this commonwealth the treasurer not only has the custody of the money, but is the general financial manager, and often the general business manager of the corporation, the rule itself has been frequently and broadly stated in our decisions and is well known both to the officers of manufacturing and trading corporations and to those of banks and financial institutions. It could not now be abrogated or unsettled without disturbing commercial transactions. There are, however, many corporations which transact more or less business to which the rule has been held not to apply. Thus, it does not apply to a college (Webber *v.* College, 23 Pick. 302); nor to a parish (Packard *v.* Society, 10 Met. 427); nor to a monument association (Torrey *v.* Dustin Monument Association, 5 Allen, 327); nor to a municipality (Bank *v.* Winchester, 8 Allen, 109); nor to a savings bank (Tappan *v.* Bank, 127 Mass. 107); nor to a horse railroad company (Craft *v.* Railroad Co., 150 Mass. 207; s. c., 22 N. E. Rep. 920)."

[1] Perry *v.* Council Bluffs Water Works Co., (1893) 67 Hun, 456; s. c., 22 N. Y. Supp. 151. The court approved the findings and the reasoning and conclusions of the referee in this case, O'Brien, J., speaking for the court, referring to them thus: "He finds that during the period from some time in the month of October, 1885, to February 27, 1887, Harry Allen, as treasurer of the defendant corporation, made and issued in the name of the defendant, and to which the name of the defendant was signed by himself as treasurer thereof, some forty or fifty promissory notes, to the order of and

§ 174. When a corporation will not be bound by the act of its treasurer.—In a case before the Supreme Court of New York the corporation provided for all its obligations by the issue of bonds. Parties, among whom was its treasurer, became possessed of these bonds by agreeing to pay the debts of the company. To discharge the personal liability thus incurred, the treasurer discounted notes of the company made by him without

indorsed 'Allen & Stead,' which were negotiated and money obtained thereon; that the reason for the making of such promissory notes to the order of Allen & Stead was that they were acting as the financial agents of the defendant, and it was to give additional credit to such notes, the credit of the corporation itself being poor, and, although the by-laws of the defendant required the countersigning by the president, none of these notes so issued was so countersigned; that the note in suit was, in form, similar to these others; that during all this period, with the exception of one in May, 1886, no meetings of the board of directors were held, and at the one meeting no business was transacted other than the re-election of officers of the defendant; that Allen, though he sought to consult and advise with the president of the corporation, was referred to the latter's law partner, who was also a director in the corporation; that none of the officers or directors used or exercised any official supervision over Allen or his acts and transactions as treasurer, except the director who was the president's law partner, and who, it would appear, was not only consulted with respect to the making of the promissory notes, and the obtaining of money thereon, but concurred in the very beginning with the making of such promissory notes; that further, he not only advised the making and issuing of such notes from time to time, but personally indorsed a large number of them, and one with the name of his firm, of which the president was a member. A review of the evidence supporting these findings will sustain the referee and justify his conclusion that Allen was practically the corporation, and that the case is brought within the principle laid down in Fifth National Bank *v.* Navassa Phosphate Company, 119 N. Y. 256, because he was not only the treasurer of the defendant, but, as said in that case, 'he was consciously invested by the company with the broad general power inseparable from the position in which it placed him as the sole manager of its affairs at its principal place of business.' Acting, therefore, within the apparent scope of the authority conferred upon him by the corporation, the latter is charged with liability, irrespective of the question of authority in fact." This particular note had been placed as collateral security with a certain party who loaned a certain amount upon it, under an agreement that it was to be paid within a few days, with interest, at the rate of five dollars a day until such time as the loan was paid. The court limited the measure of damages in the recovery to the amount loaned by this person, with legal interest from the date of his loan. It was said in the opinion: "Taking the facts here, we think that this note was not valid as a legal obligation in the hands of the payee negotiating it, or in the hands of Bradford, who delivered it to the plaintiff as collateral security for a loan made by him, but that when transferred to the plain-

its authority or knowledge, or that of its officers. It was sought to hold the corporation liable in an action by the bank which discounted them upon the ground that the treasurer was a financial officer of the corporation, and, therefore, held apparent authority to indorse the notes, so far as *bona fide* purchasers were concerned, and upon another ground that the previous conduct of the treasurer had been such in issuing the notes that the corporation must be held to have authorized the making and indorsement of the notes in suit. It was held by the court that the treasurer of a corporation engaged in the business of operating water works did not have, by virtue of his office, any implied authority to borrow money and give the corporation's note therefor.[1]

tiff it became in his hands a legal obligation against the defendant, but only to the extent of what was advanced upon the faith thereof. We think the principle of the cases, which, under such circumstances, would prevent a profit being made out of the transaction, is applicable, and that, while the plaintiff is entitled to protection to the extent of the moneys advanced, and legal interest from the date of the loan, he cannot recover either the face value of the note, with interest thereon, nor the amount loaned, with interest at the rate agreed upon by Bradford, of five dollars a day."

[1] First Nat. Bank of Middletown *v.* Council Bluffs City Water Works Co., (1890) 56 Hun, 412; s. c., 9 N. Y. Supp. 859. In support of their contention the counsel of the bank cited Bank of Batavia *v.* New York, L. E. & W. R. R. Co., 106 N. Y. 195; s. c., 12 N. E. Rep. 433, and Bank of Auburn *v.* Putnam, 1 Abb. Dec. 80. PRATT, J., upon the question whether the facts of the case brought it within the rules of the cases cited, said: "There was no evidence that any part of the proceeds of the notes sued on came to the use of the company. The bonds and money which [the treasurer] received for these notes be retained. As to the bonds, the evidence was that he still had them. As to the money, it went into his individual bank account, and he refused to say that he paid any debt of the company out of that bank account after he received the money. He would not even say that he kept the money for the payment of what the company owed him, although he tried to produce that impression. There was no evidence, however, that the company owed him anything, except his general stateemnt that they owed him something, but what the something was he did not attempt to say. Of course, as treasurer of the company, he could not issue its notes and sell them, and pocket the proceeds, under the pretense that the company owed him money, without showing some authority outside of himself for such a transaction, and without establishing, in the most satisfactory manner, that the company was indebted to him for the amount which he so obtained. The referee found that the proceeds of some of the previous notes made by [the treasurer] were applied 'to at least some extent,' to the payment of the debts and obligations of the defendant. This fact would tend to establish the company's liability for the notes sued on, under the theory that they were responsible in thus having

§ 175. Another illustration of such a case.— In a Massachusetts case it appeared that a stockholder, who was the treasurer of a street railway corporation, wrote to a customer that he could lend the proceeds of bonds sold by him for her to the corporation, and she told him that she would so lend a part of the proceeds to it, and left the amount in his hands, receiving from him a note for the amount made in the corporation's name by him alone as treasurer. She was ignorant of and made no inquiries as to the by-laws of the corporation, which provided that he could sign notes only as the directors might require, which notes, to bind the corporation, were to be countersigned by the president, but acted in good faith, believing that the treasurer of the corporation also acted honestly and had authority to make the loan and to give a note for the same binding upon the corporation. The treasurer had no such authority in terms, and, being a defaulter, used the loan to cover up his defalcation by paying debts of the corporation. The Supreme Court of Judicature held that his customer in the stock brokerage business could not recover against the corporation either upon the note or for money had and received.[1]

§ 176. When contracts of a chief engineer will bind a railroad corporation.— It appeared in a Michigan case that certain individuals organized a railroad corporation for the purpose of constructing a line of railroad. Two of these individuals entered

held out [the treasurer] as their agent to make their notes. But in order to create such an agency by representation or estoppel, it is essential that the principal shall have knowledge of the assumption by the agent of the powers he has exercised. In order to create a liability in this case, therefore, it was necessary to go a step further in the findings, and to find that the company had knowledge of the fact that [the treasurer] had so applied the proceeds of these notes. There not only is no such finding, but the referee has expressly found that the directors had no knowledge that [he] had assumed to make the notes of the company, and that they never authorized him to do so. The finding with regard to the application of the proceeds of the notes, therefore, does not go for enough to establish a liability in this case. The fact that an agent has, in one or more instances, made notes and applied the proceeds in part payment of his principal's debts, without his knowledge, creates no liability on his part for his subsequently making notes in the name of the principal."

[1] Craft *v.* South Boston Railroad Co., (1889) 150 Mass. 207; s. c., 22 N. E. Rep. 920. Upon the first point it was said: "Whatever may be true of trading corporations there is nothing in the nature of the business of a horse railroad corporation, or of the

into an agreement, by which the third interested party was to construct the road, to be paid in bonds and stock. This latter was the principal promoter of this railroad enterprise. The work was to be done under the supervision of a chief engineer. The work for building the road was let to a sub-contractor. The plaintiff in this action had furnished supplies for this work to the sub-contractor. Failing to be paid, this action against the company resulted. In it the plaintiff claimed that the goods were delivered upon orders given by the company's agent, and upon its credit. The principal question in the case arose upon the authority of the agent to bind the company. The Supreme Court of Michigan held that the question of the authority of the agent was one of fact properly submitted to the jury, and reviewed the evidence and affirmed the judgment against the company. They said of the testimony: "[It] brings the case within any one of several well-established rules. If the company relinquished to [this contractor] the matter of construction of this road, and [he] knew that [its chief engineer] was contracting these obligations in the name and upon the credit of the company, [the contractor] must be deemed to have adopted them. His knowledge was the company's knowledge, and the company is liable. If the officers of the company were advised that [the chief engineer] had incurred the indebtedness to plaintiff in the name and upon the credit of the company, and with that knowledge did not protest, but, on the contrary, corresponded directly with the plaintiffs and paid that account, plaintiffs were justified

duties of a treasurer of such a corporation, which implies that the treasurer, by virtue of his office, has authority to borrow money for the company and to give its notes therefor. It does not appear that the company in any way held out [their treasurer] to the public or to the plaintiff as having any such authority, or that treasurers of horse railroad corporations customarily have or exercise any such authority." Upon the second it was said: "No objection on the part of the [corporation] ought to be implied in this case, because [its treasurer] was a defaulter, and the money was used to cover up his defalcation by paying debts of the company, which the money of the company, if he had not embezzled it, would have been used to pay. The only reasonable inference is that [the treasurer's] primary purpose in using the money in this way was to escape detection and to benefit himself. Whether it was a benefit to the company that he was able to obtain and use money for this purpose is necessarily uncertain. The money was not borrowed *bona fide* for the use of the company. See Railroad National Bank *v.* Lowell, 109 Mass. 214; Agawam National Bank *v.* South Hadley, 128 Mass. 503."

in relying upon that action as an assurance of [the chief engineer's] authority, and extending further credit, and defendant is estopped from the denying the authority of [its chief engineer]. If [the latter], in the exercise of the authority given to him by the contract, in view of [the sub-contractor's] inability, was prosecuting the work for and on behalf of the company, and incurred this indebtedness in such prosecution of the work, the plaintiffs were entitled to recover. If [the chief engineer] was entering into contracts for the work upon the road, employing men and purchasing supplies in the name of the company and upon its credit, and the officers of the company knew of the fact, or had been advised of instances of like conduct and remained silent, the company cannot now be heard to say that such person so acting was without authority."[1] In another action against this railroad company for supplies furnished to the sub-contractor in the construction of its road, the same court held that upon the evidence the principles of the last case were established, and that the railroad company was properly found liable, not only upon the verbal arrangement made by the chief engineer with the plaintiff through its managing officer, but also upon a written guaranty of the sub-contractor's orders for supplies made by the engineer.[2] They further held in this case that the third of the then parties organizing this railroad company, with whom the two entered into the agreement for the construction of the railroad, who was its president, could bind the corporation for supplies used in the construction, though not acting by any corporate authority. This president was at the same time president of the supply company which brought this action. It was contended that from this fact, and his powers being limited in the contract with his associates for the construction of the road, which provided that "no indebtedness shall be incurred and no expenditures made without the free consent and co-operation of all the parties to the agreement," his knowledge of this limitation was the knowledge of the plaintiff, and, therefore, the

[1] Hirschmann v. Iron Range & Huron Bay R. R. Co., (1893) 97 Mich. 384; s. c., 56 N. W. Rep. 842. The court referred in its discussion to the following cases as in point: Olcott v. Railroad Co., 27 N. Y. 546, 558; Ceeder v. H. M. Loud & Sons Lumber Co., 86 Mich. 541; Whitaker v. Kilroy, 70 Mich. 635, 638; Beattie v. Railroad Co., 90 N. Y. 643.

[2] Michigan Slate Co. v. Iron Range & Huron Bay R. R. Co., (1894) 101 Mich. 14; s. c., 59 N. W. Rep. 646.

latter was estopped from the recovery. The court held adversely to this contention.[1]

§ 177. **Ratification by corporation of agent's acts — general rules.**— If a trading corporation take and hold the benefit derived from a contract made for it by an agent not duly authorized, it thereby makes the contract its own by ratification or adoption and will thereby be estopped from disputing its liability thereon.[2] A corporation will be held liable for materials furnished for its use and benefit by the order of one not expressly authorized to give such order, where its officers have knowledge of the order and do not object to it.[3] Ratification of an unauthorized act of an agent of a corporation will be inferred from failure on the part of the corporation to promptly disavow it upon knowledge of the act being brought to it.[4] The ratification of an unauthorized act of an agent of a corporation is equivalent to a previous authority, and such ratification need not be by any formal vote or resolution of the corporation, or be authenticated by the corporate seal.[5] A ratification of an act of an officer of a corporation in making a contract may be implied by the acts of the corporation as well as expressed by its vote. The acts and assent of corporations may be shown and inferred from facts and circumstances.[6] Before a corporation can be said to have ratified

[1] Ibid. The court said: "A party may act in the double relation of agent for both parties." Adams Mining Co. *v.* Senter, 26 Mich. 73; Colwell *v.* Keystone Iron Co., 36 Mich. 51; U. S. Rolling Stock Co. *v.* Atlantic & G. W. R. Co., 34 Ohio St. 450; Mayor, etc., *v.* Inman, 57 Ga. 370; Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38; s. c., 10 S. W. Rep. 865; Kitchen *v.* Railway Co., 69 Mo. 224; Fitzsimmons *v.* Express Co., 40 Ga. 330. See, as to contract made by one styled engineer of the railroad corporation, Wilson *v.* Kings County Elevated R. R. Co., (1889) 114 N. Y. 487.

[2] Pixley *v.* Western Pacific R. R. Co., (1867) 33 Cal. 183; Gas Company *v.* San Francisco, 9 Cal. 453; Argenti *v.* San Francisco, 16 Cal. 265; Fraylor *v.* Sonora Mining Co., 17 Cal. 594; Rosborough *v.* Shasta River Canal Co., 22 Cal. 556; Allen *v.* Citizens' Steam Navigation Co., 22 Cal. 28; United States *v.* Dandridge, 12 Wheat. 70; Olcott *v.* Tioga R. R. Co., 27 N. Y. 558; Hoyt *v.* Thompson, 19 N. Y. 215; Bank of Kentucky *v.* Schuylkill Bank, 1 Parsons' Sel. Cas. in Equity, 250.

[3] Beattie *v.* Delaware, Lack. & West. R. R. Co., (1881) 12 N. Y. Wkly. Dig. 334.

[4] First National Bank *v.* Fricke, (1881) 75 Mo. 178.

[5] Campbell *v.* Pope, (1888) 96 Mo. 468; s. c., 10 S. W. Rep. 187.

[6] Louisville, New Albany & Chicago Ry. Co. *v.* Carson, (1894) 151 Ill. 444;

an unauthorized contract of its agent by receiving the consideration of the contract, there must be proof that the corporation, through its proper officer, knew the terms of the contract and received the money on that account.[1] A contract having been made by an agent of a corporation out of the usual course of business of the corporation, and his receiving money as a consideration of the contract and paying it to the corporation, the retention of the money by the latter will not constitute an adoption of the contract, unless it appears that the corporation knew on what account the money was paid and what were the terms of the contract.[2]

Farmers & Citizens' Bank *v.* Sherman, 6 Bosw. 181; Hoyt *v.* Shelden, 3 Bosw. 267; Houghton *v.* Dodge, 5 Bosw. 326; Madison Avenue Baptist Church *v.* Baptist Church in Oliver St., 2 Abb. Pr. (N. S.) 254; s. c., 32 How. Pr. 335. What amounts to a ratification of the contracts of officers or agents. Marine Bank *v.* Butler Colliery Co., 52 Hun, 612; s. c., 5 N. Y. Supp. 291; Mobile & M. Ry. Co. *v.* Gilmer, 85 Ala. 422; s. c., 5 So. Rep. 138; Campbell *v.* Pope, 96 Mo. 468; s. c., 10 S. W. Rep. 187; Hamilton *v.* Bates, (Cal. 1894) 35 Pac. Rep. 304 (holding there was no ratification of an agreement of the president that the corporation should assume the debts of a person); Frank *v.* Hicks, (Wyo. 1894) 35 Pac. Rep. 475; Bibb *v.* Hall, (Ala. 1894) 14 So. Rep. 98; Nebraska & K. Farm Loan Co. *v.* Bell, 58 Fed. Rep. 326; s. c., 7 C. C. A. 253; West Salem Land Co. *v.* Land Co., 89 Va. 192.

[1] Hyde *v.* Larkin, (1889) 35 Mo. App. 365. As to corporations receiving the benefit of a contract made by its agents or officers being considered as ratifying it, see Jourdan *v.* Long Island R. R. Co., 115 N. Y. 380; s. c., 22 N. E. Rep. 153; Scott *v.* W., etc., R. R. Co., 86 N. Y. 200; Wild *v.* New York, etc., M. Co., 59 N. Y. 644; Decker *v.* G., etc., Co., 61 Hun, 516; Hoag *v.* Lamont, 60 N. Y. 96; Bommer *v.* S. S. Co., 81 N. Y. 468; Castle *v.* Lewis, (1879) 78 N. Y. 131, affirming 13 Hun, 298; Kickland *v.* Menasha Wooden Ware Co., 68 Wis. 34; Paxton Cattle Co. *v.* First Nat. Bank, 21 Neb. 621; Holmes *v.* Kansas City Board of Trade, 81 Mo. 137; Pauling *v.* London Ry. Co., 8 Exch. 867; Beverley *v.* Lincoln Gas Co., 6 Ad. & El. 829; Tuskaloosa, etc., Co. *v.* Perry, 85 Ala. 158; Melledge *v.* Boston Iron Co., 5 Cush. 158, 175; Smith *v.* Martin Anti-Fire Car Heater Co., 64 Hun, 639; s. c., 19 N. Y. Supp. 285; Brower *v.* Brooklyn Trust Co., 21 N. Y. Supp. 324; Tryon *v.* White & Corbin Co., 62 Conn. 161; s. c., 25 Atl. Rep. 712; Weatherford, M. W. & N. W. R. Co. *v.* Granger, (Tex. Civ. App. 1894) 22 S. W. Rep. 70.

[2] Pennsylvania, Del. & Maryland Steam Navigation Co. *v.* Dandridge, 8 G. & J. (Md.) 248. As to estoppel to deny authority of officers and ratification of their acts on the part of a corporation, see Tuskaloosa Cotton Seed Oil Co. *v.* Perry, 85 Ala. 158; s. c., 4 So. Rep. 635; Morrell *v.* Long Island R. Co., (N. Y. City Ct. Spl. T.) 1 N. Y. Supp. 65; Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34; s. c., 12 Atl. Rep. 732; Metropolitan T. & T. Co. *v.* Domestic T. & T. Co., 44 N. J. Eq. 568; s. c., 14 Atl. Rep. 907; Alabama Great So. R. R.

§ 178. **Modes of ratification.**— The United States Circuit Court of Appeals for the eighth circuit held that the board of directors of this corporation upon the promissory note of which this action was brought by the receiver of the bank which loaned the corporation money on the note, who were authorized by its by-laws to borrow money and execute securities therefor, might ratify the unauthorized execution of the promissory note by the secretary of the corporation, and thus the corporation would be bound.[1] In a case where the foreman of a mining corporation, with the knowledge and acquiescence of the officers of the corporation — but without any special request — advanced money to pay the debts of the corporation, and the corporation, with full knowledge of all the facts, acquiesced in the acts of its officers and agents in their dealings with the foreman, the Supreme Court of Nevada held that such knowledge and acquiescence amounted to a ratification of the acts of the foreman and rendered the corporation liable to him for the money so advanced.[2]

Co. *v.* South & North Alabama R. R. Co., 84 Ala. 570; s. c., 3 So. Rep. 286; Hoosac Mining & Milling Co. *v.* Donat, 10 Col. 529; s. c., 16 Pac. Rep. 157; Second Nat. Bank *v.* Pottier & Stymus Mfg. Co., 56 N. Y. Super. Ct. 216; s. c., 2 N. Y. Supp. 644; Getty *v.* C. R. Barnes Milling Co., 40 Kans. 281; s. c., 19 Pac. Rep. 617; Corn Exchange Bank *v.* American Dock & Trust Co., 78 Hun, 400; s. c., 29 N. Y. Supp. 158; Thomas *v.* City Nat. Bank, (Neb. 1894) 58 N. W. Rep. 943; Moyer *v.* East Shore Terminal Co., (1893) 41 S. C. 300; s. c., 19 S. E. Rep. 651; Norton *v.* Alabama National Bank, (Ala. 1894) 14 So. Rep. 872; Martin *v.* Santa Cruz Water Storage Co., (Ariz. 1894) 36 Pac. Rep. 36 (where there was held to have not been a ratification); Currie *v.* Bowman, (1894) 25 Or. 364; s. c., 35 Pac. Rep. 848 (ratification of execution of a mortgage); Church *v.* Sterling, 16 Conn. 398; Howe *v.* Keeler, 27 Conn. 554; Johnson *v.* Smith, 21 Conn. 632; Hewitt *v.* Wheeler, 22 Conn. 564; Hyde *v.* Larkin, 35 Mo. App. 365; Union Bridge Co. *v.* Troy & Lansingburgh R. R. Co., (1872) 7 Lans. 240. What does not: Harrington *v.* First Nat. Bank of Chittenango, (1873) 1 T. & C. 361. In Liebfritz *v.* Dubuque Street Railway Co., (1878) 48 Iowa, 709, the managing director of a corporation having knowledge that an agent of the company had borrowed money and applied it to the payment of corporate indebtedness, the corporation was held liable for the sum borrowed.

[1] Nebraska & Kansas Farm Loan Co. *v.* Bell, (1893) 58 Fed. Rep. 326; citing Allis *v.* Jones, 45 Fed. Rep. 148; Indianapolis Rolling Mill Co. *v.* St. Louis, Ft. S. & W. Ry. Co., 120 U. S. 256; s. c., 7 Sup. Ct. Rep. 542; Pittsburgh, C. & St. L. Ry. Co. *v.* Keokuk & H. Bridge Co., 131 U. S. 378; s. c., 9 Sup. Ct. Rep. 770.

[2] Martin *v.* Victor Mill & Mining Co., (1885) 19 Nev. 180; s. c., 8 Pac. Rep. 161. A ratification of an agent's use of the corporation's funds for "special purposes" by a resolution of the directors, held not to be void, as constituting a fraud upon the stock-

§ 179. Illustration of ratification of contract of agent.—In a late California case it appeared that a corporation, by resolution of its directors, authorized its president to execute a mortgage to secure a loan at a rate of interest and for a length of time specified. The mortgage executed by him was for a shorter period than authorized, and provided that the interest should be paid monthly; that a failure to pay interest when due rendered the principal due and that the mortgagees should recover attorney's fees in case of foreclosure. In an action to foreclose this mortgage the assignee of the corporation appointed after the suit was begun, being made a party, defended upon the ground *inter alia* that the execution of the mortgage on terms which were a departure from the terms named in the resolution of the directors was in excess of the authority of the president and not binding upon the corporation. The facts that the president of the corporation included in the note and mortgage terms and conditions which the corporation had power to authorize, but which it did not authorize him to insert; that the corporation received the consideration of $17,000 from the plaintiffs and applied the money to its uses, including the payment of a prior mortgage upon its property and the extinguishment of the lien thereof; that the

holders. Clark *v.* American Coal Co., (1892) 86 Iowa, 436. As to contracts being made valid by ratification by a corporation, see Dubuque College *v.* Dubuque, 13 Iowa, 555–560; Beach on Priv. Corp. § 195; Oregon Ry. *v.* Oregon Ry. & Nav. Co., 28 Fed. Rep. 505; Greenleaf *v.* Norfolk Southern Ry., 91 N. C. 33; First Nat. Bank *v.* Fricke, 75 Mo. 178; Kelsey *v.* National Bank, 69 Pa. St. 426; Eureka Co. *v.* Bailey Co., 11 Wall. 488, 491; Gold Mining Co. *v.* National Bank, 96 U. S. 640, 644; Pacific Rolling Mill Co. *v.* Dayton Ry., 7 Sawy. 61, 67; Walworth Co. Bank *v.* Farmers' Loan & Trust Co., 16 Wis. 629; Connett *v.* City of Chicago, 114 Ill. 233; Wood *v.* Whelen, 93 Ill. 153. Ratification generally: Nims *v.* Mt. Hermon Boys' School, 160 Mass. 177; s. c., 35 N. E. Rep. 776; People *v.* Eel River & E. R. Co., 98 Cal. 665; s. c., 33 Pac. Rep. 728; Willis *v.* St. Paul Sanitation Co., (1893) 53 Minn. 370; s. c., 55 N. W. Rep. 550; Augusta, T. & G. R. Co. *v.* Kittel, 52 Fed. Rep. 63; s. c., 2 C. C. A. 615; 2 U. S. App. 409; Hitchings *v.* St. Louis, N. O. & O. Canal & Transp. Co., 68 Hun, 33; s. c., 22 N. Y. Supp. 719; Tingley *v.* Bellingham Bay Boom Co., 5 Wash. St. 644; s. c., 32 Pac. Rep. 737; Goldbeck *v.* Bank, 147 Pa. St. 267; Haines *v.* Detrick, 75 Md. 256; Smith *v.* Martin Anti-Fire Car Heater Co., 64 Hun, 639; s. c., 19 N. Y. Supp. 285; Seymour *v.* Association, 64 Hun, 632; McComb *v.* Association, 134 N. Y. 598; Shaver *v.* Hardin, 82 Iowa, 378; Hayden *v.* Wheeler & Tappan Co., 66 Hun, 629; s. c., 20 N. Y. Supp. 902; Seal *v.* Puget Sound Loan & Invest. Co., 5 Wash. St. 422; s. c., 32 Pac. Rep. 214.

corporation, by its representations, declarations and acts, through its directors, intentionally led the plaintiffs to believe, and they did believe, the president of the corporation was authorized to execute the note and mortgage for one year, with interest payable monthly; that the corporation, with full knowledge of the terms and conditions of the note and mortgage, received and used the consideration of $17,000, and paid the interest thereon monthly as the same became due for about four months, were held sufficient to constitute a ratification of the acts of the president of the corporation and sufficient to support the invocation of an estoppel in pais.[1]

§ 180. **What does not amount to a ratification.**— A treasurer of a Massachusetts savings institution for the corporation became a party to an assignment for the benefit of creditors, and thereby undertook to release one of the promisors on a joint and several note belonging to the institution. The by-laws of the corporation, concerning the duties of the treasurer or as *ex officio* secretary, after enumerating several particulars, provided generally that "he shall perform and discharge all such other duties, in addition to the above, as are usually required of the treasurer and secretary of similar institutions." There was no record of any vote of the institution to release any claim against any person, or to cancel, or discharge, or receive payment, partial or in full, of any debt of any person whatever. The binding effect of this action of the treasurer upon the corporation being for the consideration of the Supreme Court, it was held that the treasurer of an incorporated institution for savings had no authority, as such, and without being specially authorized thereunto, to execute a release in the name of the corporation. Further, they held that the facts that payments of dividends were subsequently made to the treasurer's successor in office, and indorsed on the note of the one making the assignment, and entered in the books of the institution, as so much received of the assignees of the promisor, and the treasurer's account and cash, including the sum so received, and the notes of the institution, including the note in question, were subsequently examined by a committee and certified as correct, were not acts which amounted to a ratifi-

[1] Gribble *v.* Columbus Brewing Co., (1893) 100 Cal. 67; s. c., 34 Pac. Rep. 527.

cation of the release.[1] It appeared, in an action upon a written contract executed in the name of a corporation by its president, that there was no vote, either of the corporation or of the directors, giving the president authority to execute the contract; that under the by-laws, the directors might confer upon him such authority; that there were five directors, of whom the president was one, and there was evidence that one director, besides the president, knew of this contract, but there was no direct evidence that the other three directors had any knowledge of it. The jury were instructed that if "the corporation, represented by its entire board of officers, knew of and ratified the contract, it would be as binding as if the corporation had authorized it by express vote," with this *addendum:* "But all directors of a corporation are presumed to know what it is their duty to know, what they are able to know, and what they undertook to know when they accepted the responsibility of directors, and a jury have a right to suppose that the directors of a corporation have a knowledge of its concerns. In the absence of direct and positive evidence of the knowledge of the directors, jurors have a right to assume that they are doing what they were appointed to do, and that they know what they are appointed to know." The Supreme Court of Massachusetts held such instruction to be erroneous.[2]

[1] Dedham Institution for Savings *v.* Slack, (1850) 6 Cush. 408.

[2] Murray *v.* Nelson Lumber Company, (1887) 143 Mass. 250; s. c., 9 N. E. Rep. 634. MORTON, Ch. J., speaking for the court, said: "It is a well-settled rule that a ratification by a principal of the unauthorized acts of an agent, in order to be effectual, must be made with a knowledge on the part of the principal of all the material facts. And the burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence. Combs *v.* Scott, 12 Allen, 493. Where the alleged principal is a corporation, a ratification may be shown by proving that the officers who had the power to authorize the act knew of it, and adopted it as a valid act of the corporation, although no formal vote is passed by them. Sherman *v.* Fitch, 98 Mass. 59; Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315; Kelley *v.* Newburyport Horse Railroad, 141 Mass. 496. In the case at bar, therefore, it was incumbent upon the plaintiff to show that the directors, or at least a majority of them, knew of the contract and its terms, and that, with such knowledge, they acquiesced in and adopted it. But the instructions given by the court gave to the jury a different test. Under them, the jury would naturally understand that it was not necessary to find that the directors

knew of the contract, and that it would be sufficient if, in their judgment, the directors, by the use of diligence, might have known it. The instructions are even broader than this, as they told the jury that the directors were presumed to know what they were able to know, and that the jury had the right to suppose that the directors of a corporation had a knowledge of its concerns." Knowledge of officer imputable to the corporation. Anderson *v.* Kinley, (Iowa, 1894) 58 N. W. Rep. 909; Merchants' Nat. Bank *v.* Tracy, 77 Hun, 443; s. c., 29 N. Y. Supp. 77; Huron Printing & Bindery Co. *v.* Kittleson, (S. D. 1894) 57 N. W. Rep. 233; Willard *v.* Denise, 50 N. J. Eq. 482. Estoppel of corporation to deny authority of its officers and agents. Dallas *v.* Columbia Iron & Steel Co., 158 Pa. St. 446; s. c., 27 Atl. Rep. 1055; St. Louis & S. F. R. Co. *v.* Kirkpatrick, 52 Kans. 104; s. c., 34 Pac. Rep. 400; Duggan *v.* Pacific Boom Co., 6 Wash. 593; s. c., 34 Pac. Rep. 157; Merchants' Nat. Bank *v.* Citizens' Gaslight Co., 159 Mass. 505; s. c., 34 N. E. Rep. 1083; Jourdan *v.* Long Island R. Co., 115 N. Y. 380; s. c., 22 N. E. Rep. 153; Beach *v.* Miller, 130 Ill. 162; s. c., 22 N. E. Rep. 464; Brown *v.* Wright, 25 Mo. App. 54.

CHAPTER V.

FRAUDULENT ACTS OF OFFICERS.

§ 181. **General rules.**— Directors of a corporation will be held responsible to the stockholders for losses from fraud, embezzlement, willful misconduct, breach of trust and for gross inattention or negligence, as a result of which fraud has been perpetrated by agents, officers or co-directors.[1] It is now well settled that directors and managers of corporations are equally within the rule which guards and restrains the dealings and transactions between trustee and *cestui que trust* and agent and his principal, such directors or managers being in fact trustees and agents of the bodies represented by them.[2] Bank directors are not mere agents, like cashiers, tellers and clerks. It is the duty of the board to exercise a general supervision over the affairs of the bank and to direct and control the action of its subordinate officers in all important transactions. * * * They invite the public to deal with the corporation, and when any one accepts the invitation he has the right to expect reasonable diligence and good faith at their hands, and if they fail in either, they violate a duty they owe not only to the stockholders but to the creditors and patrons of the corporation.[3] The directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders, and are bound to administer its affairs according to the terms of its charter and in good faith. If they fail in either respect they are liable to the party in interest who is injured by it for a breach of trust and may be made to account with him in a court of chancery.[4] The character of directors as

[1] Spering's Appeal, (1872) 71 Pa. St. 11.

[2] Cumberland Coal & Iron Co. *v.* Parish, 42 Md. 598; Cumberland Coal & Iron Co. *v.* Sherman, 30 Barb. 553; Stewart *v.* Lehigh Valley Railroad Co., 38 N. J. Law, 505; Gardner *v.* Butler, 30 N. J. Eq. 702; Kitchen *v.* St. Louis, etc., Railway Co., 69 Mo. 224; Chouteau *v.* Allen, 70 Mo. 290; Hubbard *v.* N. Y., etc., Investment Co., 14 Fed. Rep. 679.

[3] United Society *v.* Underwood, 9 Bush, 609. See, also, Bank *v.* Wulfekuhler, 19 Kans. 60.

[4] Bank *v.* St. John, 25 Ala. 566.

agents of a corporation for the management of its affairs for the benefit of its stockholders and creditors forbids the exercise of their powers for their own personal ends against the interest of the corporation. Their position is one of great trust, and to engage in any matter for their personal advantage inconsistent with it would be to violate their duty and to commit a fraud upon the company.[1] They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act and then personally participate in the benefits. Hence all arrangements by directors of a corporation to secure an undue advantage to themselves at its expense, by the formation of a new corporation as an auxiliary to the original one, with an understanding that they, or some of them, should take stock in it, and then that valuable contracts should be given to it, in the profits of which they, as stockholders in the new corporation, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original corporation, and will be condemned whenever properly brought before courts for consideration.[2] A director of a corporation is a trustee of the corporation, and is under the disability which attaches to all trustees in dealing with trust property and in transacting the business pertaining to the trust. He cannot act as trustee and for himself at the same time, and will not be permitted to make a profit to himself in his dealings with the corporation. It is against public policy to allow persons occupying fiduciary relations to be placed in such positions as that there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives.[3]

[1] Wardell *v.* Railroad Co., (1880) 103 U. S. 651.

[2] Ibid.; citing Great Luxembourg Railway Co. *v.* Magnay, 25 Beav. 586; Benson *v.* Heathorn, 1 Y. & Cal. C. C. 326; Flint & Pere Marquette Railway Co. *v.* Dewey, 14 Mich. 477; European & North American Railway Co. *v.* Poor, 59 Me. 277; Drury *v.* Cross, 7 Wall. 299.

[3] Barnes *v.* Brown, (1880) 80 N. Y. 527; citing Risley *v.* Indianapolis, B. & W. R. R. Co., 62 N. Y. 240; Butts *v.* Wood, 37 N. Y. 317; Stewart *v.* Lehigh Valley R. R. Co., 38 N. J. Law, 505; Gardner *v.* Butler, 30 N. J. Eq. 702; Foster *v.* Oxford, W. & W. Ry. Co., 14 Eng. Law & Eq. 306; Aberdeen Ry. Co. *v.* Blakie, 1 MacQueen H. L. 461. As to the duties of directors and the restrictions upon their action in matters of the corporation growing out of their trust relation in Bird Coal & Iron Co. *v.* Humes, (1893) 157 Pa. St. 278; s. c., 27 Atl. Rep. 750; 33 W. N. C. 174, Mr. Justice DEAN said: "A director is a trustee for the entire body of stockholders, and both good morals and good law imperatively demand he shall manage

§ 182. General rules continued.—A director of a corporation cannot become a contractor with the corporation nor can he have any personal or pecuniary interest in a contract between the cor-

all the business affairs of the company with a view to promote, not his own interests, but the common interests, and he cannot directly or indirectly derive any personal profit and advantage by reason of his position distinct from his co-shareholders. 1 Potter on Corp. § 330; Moraw. on Corp. 517, 518. And by assuming the office he undertakes to give his best judgment in the interests of the corporation in all matters in which he acts for it untrammeled by any hostile interest in himself or others. There is an inherent obligation as his part that he will in no manner use his position to advance his own interest as an individual as distinguished from that of the corporation. Cumberland Coal & Iron Co. *v.* Parish, 42 Md. 598; Hill *v.* Frazier, 22 Pa. St. 320. And all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made advantaged the corporation of which he was director. Parker *v.* Nickerson, 112 Mass. 195." Fiduciary relation of directors to shareholders discussed, and English and American decisions on the subject examined. 26 Can. Law J. 66. In McGourkey *v.* Toledo & Ohio Central Ry. Co., (1892) 146 U. S. 536, a case involving the right of the purchasers of railway property under a foreclosure sale to certain rolling stock which was claimed to be the property of those representing a "contract," the Supreme Court of the United States, speaking through Mr. Justice Brown, thus refers to the acts of the directors in the matter: "The directors of this road were evidently acting in two inconsistent capacities. As directors they were bound to watch and protect the interests of the road and obtain the rolling stock upon the most advantageous terms. As holders of the car trust certificates, or representatives of such holders, it was to their interest to lease the same at the best possible rate and to make sure that as directors this rolling stock should never become their property except at the highest price. In other words, they were both buyers and sellers or lessors and lessees of the same property," and their action was condemned by the court upon authority of the cases of Wardell *v.* Railroad Co., 103 U. S. 651; Gilman, etc., Railroad Co. *v.* Kelly, 77 Ill. 426; Whelpdale *v.* Cookson, 1 Ves. Sr. 9; Drury *v.* Cross, 7 Wall. 299; York Buildings Co. *v.* Mackenzie, 3 Paton (Scotch) App. Cas. 378; People *v.* Overyssel Township Board, 11 Mich. 222, and others. The competency of the mortgagee to impeach this transaction was questioned in McGourkey *v.* Toledo & Ohio Central Ry. Co., *supra*. Upon this question it was said: "A contract of this kind is clearly voidable at the election of the corporation, and when such corporation is represented by the directors against whom the imputation is made, and the scheme was in reality directed against the mortgagees, and had for its very object the impairment of their security by the withdrawal of the property purchased from the lien of their mortgage, it would be manifestly unjust to deny their competency to impeach the transaction. The principle itself would be of no value if the very party whose rights were sacrificed were denied the benefits of it."

poration and a third person.[1] A board of directors who have made a barter of the assets of the corporation for personal gain cannot, by an act purporting to be an acceptance for the corporation of an equivalent for the assets, conclude the stockholders or their representatives from showing that no equivalent was actually received.[2] Officers of a corporation have the custody and charge of its property, and occupy the relation of trustees of the stockholders. They have no right to enter into or participate in a combination as, in this case, with a holder of a few bonds secured by a mortgage of the property of the corporation, a railroad company, who had obtained a judgment upon his bonds in a state court and entered into an agreement with certain officers to have a sale of the property in an obscure place unknown to others interested and buy in the property, the object of which combination is to divest the corporation of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. To seek their own profit at the expense of the corporation, its stockholders, or even its bondholders, is forbidden by their relation to the corporation.[3] It being the duty of a director of a corporation to know its financial condition, he cannot avail himself of any dereliction of such duty to secure a personal advantage over other creditors of the corporation.[4] Directors acting honestly for what they esteem the best interests of the corporation, and not willfully perverting their powers, but only misjudging them, will not be held to account for money expended in such case.[5] The directors of a corporation created for the sale of lands may reject offers for the lands, this being within their discretion, and though imprudently done, if there be no fraud, they will not be liable for any loss resulting therefrom.[6] Where expenditures may be made by directors of a corporation in carrying out its prime object, even if such expenditures be *ultra vires*, stockholders knowing of them and not objecting until long after their completion, cannot compel the directors of the corporation

[1] Port *v.* Russell, 36 Ind. 60.

[2] Guild *v.* Parker, 43 N. J. Law, 430.

[3] Jackson *v.* Ludeling, (1874) 21 Wall. 616, ordering the setting aside and canceling as fraudulent and void the sale and purchase of the property by these conspirators and holding them to account for all moneys and profits received by them out of the property or its use.

[4] Clay *v.* Towle, 78 Me. 86; s. c., 2 Atl. Rep. 852.

[5] Watts' Appeal, (1875) 78 Pa. St. 370.

[6] Ibid.

to account for the moneys expended.[1] When the act of directors of a corporation complained of is to be followed by large expenditure of money a stockholder should not only make his protest within a reasonable time, but should follow it up by active preventive measures. Six years', for instance, omission to proceed will effectually bar a stockholder's right to an action against directors for the misuse of corporate property.[2] A court of equity will set aside the sale of corporate property sold for much less than its value, on a sale by trustees of a corporate mortgage, if shown that one of the trustees had accepted a bribe.[3] A contract in the name of a corporation, by its board of directors, is not void, if otherwise unassailable, simply because some of the directors constituting a minority may use their position with the effect, or even for the purpose, of advancing their personal interests to the injury of the corporation they assume to represent.[4] The courts will refuse to enforce an agreement between a director of a corporation and a third party whereby the director agrees to use his vote and influence to the disadvantage of the corporation.[5] Directors of a corporation, as they are managing the funds as trustees of the stockholders, have no right to use or appropriate the funds of their *cestui que trust* to themselves. They have no power to waste, destroy, give away or misapply it, and, therefore, where there is no salary provided for their services they are not authorized to vote one to themselves or to any one of their number.[6] A court of equity will scrutinize with vigorous and jealous observation any attempt of directors of a corporation to make a pledge of its assets in favor of themselves.[7] Directors and officers of a corporation from their position of trust, which requires that they act in the utmost good faith, will not be allowed to deal with corporate funds and property for their private gain.[8] The application of the corporate assets of an insolvent corpora-

[1] Ibid.

[2] Ibid.

[3] White Mountains Railroad *v.* White Mountains (N. H.) Railroad, 50 N. H. 50.

[4] Jesup *v.* Illinois Central R. Co., (1890) 43 Fed. Rep. 483.

[5] Attaway *v.* Third National Bank, (1887) 93 Mo. 485; s. c., 5 S. W. Rep. 16.

[6] Holder *v.* La Fayette, Bloomington & Mississippi Ry. Co., (1873) 71 Ill. 106; Gridley *v.* La Fayette, Bloomington & Mississippi Ry. Co., (1873) 71 Ill. 200.

[7] Chouteau *v.* Allen, (1879) 70 Mo. 290.

[8] Ward *v.* Davidson, (1886) 89 Mo. 445.

tion to debts due the officers, to the exclusion of other creditors, by such officers will not be permitted.[1] A trustee of a corporation can make no agreement for the appropriation of the property of the corporation, authorized by his own vote, that will be valid against the corporation. And where an action is brought against a trustee to compel him to account to the corporation for its property thus appropriated, he cannot defend on the ground that he was a creditor of the corporation and voted as one of its trustees to transfer the property of the corporation to himself as a creditor to pay the debt of the corporation due to him, and then, at a subsequent meeting of the board, by his own vote, carried a resolution to ratify such disposition of the property.[2] In a case where the controlling directors of two corporations were the same persons it was held that a preferential mortgage given by one to the other, as security for payments and liabilities resulting from an acceptance of drafts by the latter for the accommodation of the former, was invalid because it operated to protect the officers of the accepting company against personal liability for their maladministration in accepting paper for accommodation.[3] A corporation having been officially declared insolvent by its directors, and they having determined to wind up its affairs with a view of paying its debts, the directors cannot deliver the assets

[1] McNeill *v.* Lacey, (1890) 33 Ill. App. 310. In Hart *v.* Brockway, 57 Mich. 189; s. c., 23 N. W. Rep. 725, where the directors of a railway corporation had collected subscriptions and taken aid notes to be used in building the road and in discharging existing obligations, the court held that an individual director could not apply such funds as he had collected to the payment of his own personal share of any obligation made jointly with the other directors.

[2] Gildersleeve *v.* Lester, (1893) 68 Hun, 532; s. c., 22 N. Y. Supp. 1026.

[3] Hutchinson *v.* Sutton Manufacturing Co., (1893) 57 Fed. Rep. 998. See, also, Lippincott *v.* Carriage Co., 25 Fed. Rep. 577; Howe *v.* Tool Co., 44 Fed. Rep. 231. As to the right of an officer to loan money to a corporation and take a mortgage to secure the loan upon the same terms and in the same manner as other persons, see Mullanphy Savings Bank *v.* Schott (1890) 135 Ill. 655; s. c., 26 N. E. Rep. 640, affirming 34 Ill. App. 500. Cases in which the transactions of the corporation with its directors were held to be valid. Hannerty *v.* Standard Theater Co., (1891) 109 Mo. 297; s. c., 19 S. W. Rep. 82; In re Pyle Works, (1891) 1 Ch. 173. What class of contracts made by directors with each other are voidable. Mallory *v.* Mallory-Wheeler Co., (1891) 61 Conn. 131; s. c., 23 Atl. Rep. 708. An illustration of a case in which a director cannot sell to himself. Green *v.* Hugo, (1891) 81 Tex. 452; s. c., 17 S. W. Rep. 79. As to acts by directors where their inter-

of the corporation to one of the board in payment of his debt, to the exclusion of its other creditors.[1]

§ 183. **Breaches of trust.**— Should directors pay over the funds of a corporation in their hands or in its treasury to an individual upon a pretended claim which they know, or must be presumed to know, is wholly unfounded in law, they will be guilty of a breach of trust.[2] Directors of a bank are personally responsible for damages resulting to the bank from their acts or neglect.[3] The measure of damages in an action against them would be the extent of the injury.[4] Officers of a bank are the agents of the corporation, and will be held liable for the abuse of their trust wherever the agents of an individual will be.[5] Directors are

est is adverse to the corporation, see Waite *v.* Mining Co., 36 Vt. 18; Waite *v.* Mining Co., 37 Vt. 608.

[1] Williams *v.* Jackson County Patrons of Husbandry, (1886) 23 Mo. App. 132.

[2] Butts *v.* Wood, (1862) 38 Barb. 181. In this case one who was secretary and treasurer of the corporation, as well as one its directors, presented a claim to the board of directors for compensation for his services as secretary, and the claim was allowed and ordered to be paid by the vote of the three directors present, himself being one of them, his father another, and a relative the third. The Supreme Court of New York, in General Term, speaking through JOHNSON, J., said: "The transaction challenges the most jealous and severe scrutiny, even if there was legal color for the claim. But as there was in fact no legal claim the court is in duty bound to pronounce this disposition of the funds of the company, thus made, fraudulent and void as against the other stockholders. It is a clear abuse of trust, and should not be allowed to stand."

[3] Percy *v.* Millaudon, 3 La. 568.

[4] Ibid. In Ilion Bank *v.* Carver, (1857) 31 Barb. 230, it appeared that a director of the bank, its president, pretended to sell his stock, amounting to $15,000, for $17,250, to an irresponsible person, and with the connivance of his son, who was the cashier of the bank, this irresponsible pretended purchaser of stock hypothecated the stock for a loan of the largest amount named above, and received bills of the bank for the same. It was charged in the action that this was a conspiracy between these parties by which the bank was to be crippled and the president to realize for his stock from the bank more than its real value. It was held that whether the transaction was treated as a willful violation of the duty which the president and cashier owed to the bank, growing out of their official relations to it, or as a direct conspiracy to cripple and defraud it, the parties concerned in it were liable to the bank for the damages which it had sustained in consequence of their acts. Further, that in such a case no *laches* on the part of the bank, short of the Statute of Limitations, would constitute a defense to the action.

[5] Austin *v.* Daniels, (1847) 4 Denio, 299. In this case the officers of the bank purchased state stocks to carry on a private undertaking in which they were engaged, and signed a contract obliging the bank to pay for the stock, and then took money from the bank to fulfill their engagement. They

authorized to manage and conduct the business of a corporation, to audit and pay its debts and make such contracts as are within the ordinary scope and business of the corporation. They are not, however, authorized to vote away the funds of the stockholders upon claims known by them to be fictitious or unfounded, for such would be a breach of their trust. They have not the power, as directors, to mortgage or consolidate the corporation with any other corporation, or compel stockholders to surrender up the stock owned by them, or to accept stock in another corporation. This power exists only in the stockholders.[1] Directors of a corporation knowingly issuing bonds of the corporation falsely purporting to be "first mortgage bonds," and placing them in the hands of an agent who sold them to a purchaser who was ignorant of the fact that they were not first mortgage bonds, have been held liable to the purchaser of the bonds who suffered by the deception of the indorsement upon the bonds that they were "first mortgage bonds."[2] It is beyond doubt that the directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders, and are bound to administer its affairs according to the terms of its charter and in good faith. If they fail in either respect they are liable to the party in interest who is injured by it for a breach of trust, and may be made to account with him in a court of chan-

were held liable to the receiver of the bank for the money so taken. The money, it appeared further, was taken for this purpose by the cashier with the assent of the president, the financial officer of the bank. It was further held that this assent of the president did not protect the cashier, as it appeared that he was a party to the private enterprise in which the money was to be used. As to the liability of the directors of a moneyed institution for improperly obtaining and disposing of the funds or property of the corporation, see Franklin Fire Insurance Co. *v.* Jenkins, 3 Wend. 130. As to the degree of diligence required from directors of a corporation in the case of its corporate affairs, see Scott *v.* Depeyster, 1 Edw. 513.

[1] Kelsey *v.* Sargent, (1886) 40 Hun, 150; citing Blatchford *v.* Ross, 54 Barb. 42.

[2] Clark *v.* Edgar, (1884) 84 Mo. 106, affirming s. c., 12 Mo. App. 345. In Bartholomew *v.* Bentley, (1852) 1 Ohio St. 37, the Supreme Court of Ohio, in which a verdict had been rendered in the Supreme Court on circuit in favor of a holder of bills of a bank against its managing officers under the statute of that state, allowing a recovery against unauthorized bankers, and the case reserved to the Supreme Court on a motion for a new trial, the court denied the motion, holding that the fraud upon the charter, and the combination to defraud the public would prevent those participating in it from claiming any protection under its provisions to escape private responsibility.

cery.[1] Should a bank allow its stockholders to withdraw its funds to the amount of their subscriptions, and to use them without security, in their private business, such conduct will be a fraud on its creditors which would render its directors liable in equity for the amount so withdrawn, and each agent who participated in the fraud individually responsible for the amount traced to his hands and all profits made from its use.[2] It was further held in this case that the surrender to the bank's agent of its notes, and the acceptance from him of his draft on a third person, was but the substitution of one security for another, and did not extinguish the original liability on the notes, unless the draft was drawn in good faith and accepted as an absolute payment and discharge of the notes; and even if it was through the fraud of the agent accepted as an absolute payment, the fraud would prevent it from so operating.[3] Directors of a moneyed corporation who release shareholders from the payment in full of their shares, would be guilty of a breach of trust.[4]

§ 184. Officers interested in contracts with a corporation. — Under the general authority giving to the president and cashier of a bank entire control of all financial matters of the bank, unrestricted by the by-laws or rules of the board of directors or stockholders, the Supreme Court of Minnesota has held they could not bind the bank by any contract to which they, or either of them, were parties.[5] A contract made between a

[1] Bank of St. Marys *v.* St. John, Powers & Co., (1854) 25 Ala. 566; citing Attorney-General *v.* Aspinall, 2 Myl. & Cr. 625; Attorney-General *v.* Kell, 2 Beav. 575; Attorney-General *v.* Corp. of Leicester, 7 Beav. 176.

[2] Bank of St. Marys *v.* St. John, Powers & Co., (1854) 25 Ala. 566.

[3] Ibid.

[4] Walton *v.* Hake, (1881) 9 Mo. App. 595.

[5] Rhodes, Assignee, *v.* Webb, (1877) 24 Minn. 292. GILFILLAN, Ch. J., said: "The transaction [in this case], briefly stated, was an attempt by the president to use the property of the bank, this note, [upon which the assignee's suit was brought], in his own private business, in payment for a purchase made for his own benefit. A general authority to transact the business and manage the finances of the bank would not authorize such a use of its property. Nor do we see that the case of defendant is in any way aided by trying to make out of it a satisfaction of the note by substituting for it the promise of [the president] to the cashier that he would pay to the bank the amount of the note; for general authority in the president and cashier to make contracts on behalf of the bank would be subject to the rule of law that an agent or trustee cannot bind his principal, or *cestui que trust*, by a contract

corporation and one of its directors to the pecuniary advantage of that director, if made at a meeting of the board of directors when he is present and takes part in the proceedings, is void.[1] Directors of a railway corporation, to whom it has been confided

made by him on behalf of his principal, or *cestui que trust*, with himself. General authority in these officers to make discounts would not authorize them to bind the bank by discounting their own notes. Such authority to the president of a bank to certify checks drawn on it does not extend to checks drawn by himself. [Citing] Claflin *v.* Farmers & Citizens' Bank, 25 N. Y. 293. This restraint upon agents, and those occupying fiduciary positions, is essential to secure absolutely fair dealing and adequate protection to those whose interests are confided to them." In Adams *v.* Kehlor Milling Co., (1888) 36 Fed. Rep. 212, a preference was granted by the directors of the corporation known to be insolvent to the estate of one who was a director and its president, deceased. The board at the time consisted of three persons; two of whom were brothers of deceased, and one of them his agent voting his stock at corporation meetings. One of the brothers was a creditor of the estate preferred. It was held that the preference under the circumstances was illegal, and that an unsecured judgment creditor of the corporation was entitled to recover of the two directors who were brothers of the deceased, who had voted for the preference, such percentage of his debt as he would have received if the sum wrongfully paid by way of preference had been divided *pro rata* among all the unsecured creditors; but the other director, not being present at any of the meetings of the directors, and not voting for any of the resolutions relating to this preference, was held not to be liable personally, to the judgment creditor. Cases bearing more or less upon the non-enforceability of contracts of directors with the corporation. Conro *v.* Port Henry Iron Co., 12 Barb. 27; Buffalo, etc., R. R. Co. *v.* Lampson, 47 Barb. 533; Morrison *v.* Ogdensburg & L. C. R. Co., 52 Barb. 173; Alford *v.* Miller, 32 Conn. 543; Coons *v.* Tome, 9 Fed. Rep. 532; Stout *v.* Yaeger, 13 Fed. Rep. 802; Gray *v.* New York & Virginia S. Co., 3 Hun, 388; Mayor of Griffin *v.* Inman, 57 Ga. 370; Bestor *v.* Wathen, 60 Ill. 138; Harts *v.* Brown, 77 Ill. 226; Paine *v.* Lake Erie & L. R. Co., 31 Ind. 283; First National Bank *v.* Gifford, 47 Iowa, 575; Cumberland Coal & Iron Co. *v.* Parish, 42 Md. 598; Redmond *v.* Dickerson, 9 N. J. Eq. 515; Gardner *v.* Butler, 30 N. J. Eq. 702; Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293; U. S. Rolling Stock Co. *v.* Atlantic & Great Western R. Co., 34 Ohio St. 450; McAleer *v.* McMurray, 58 Pa. St. 126; West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557; Cook *v.* Berlin Woolen M. Co., 43 Wis. 433. In Hubbard *v.* New York, N. E. & W. Investment Co., (1882) 14 Fed. Rep. 675, 676, NELSON, D. J., said: "A director of a corporation is not absolutely prohibited by law from entering into a contract with the corporation through his co-directors. Whether such a contract is binding upon the corporation must depend upon its terms and the circumstances under which it was made. Owing to the peculiar relation which the directors owe to the corporation, being

[1] Atlanta Hill Mining Co. *v.* Andrews, (1887) 55 N. Y. Super. Ct. 93; citing Butts *v.* Wood, 37 N. Y. 317; Kelsey *v.* Sargent, 40 Hun, 150.

to purchase the right of way for its road, will not be allowed to expend the funds of the corporation in expensive erections upon land necessary for the purpose, and at the same time to purchase or hire the land in their individual right and avail themselves of the title thus acquired to make extortionate demands of the corporation for the use of the land, and in default of submission to such demands, to destroy the erections they may have made as agents for and at the expense of the corporation.[1] That some of the directors and stockholders of a corporation who, as such, voted for a resolution authorizing the execution of mortgages of its property to secure certain debts may have been guarantors and indorsers upon most of them will not invalidate the mortgages.[2] It appeared in a case in the federal courts that the

[1] Blake *v.* Buffalo Creek R. R. Co., (1874) 56 N. Y. 485. RAPALLO, J., speaking for the court, said: "Well-settled rules forbade their [the directors] acquiring for themselves the property which it was their duty to acquire for the company, and which was necessary for its purposes. Such a dealing would be equally objectionable as purchasing from the company land which it was their duty to sell on its behalf. In respect to this last class of dealings directors of corporations stand upon the same footing as ordinary trustees. Citing Aberdeen Railway Co. *v.* Blakie, 1 MacQueen, 461; Hoffman Coal Co. *v.* Cumberland Coal & Iron Co., 16 Md. 456; Cumberland Coal & Iron Co. *v.* Sherman, 30 Barb. 553. It is a rule of equity of universal application that no person can be permitted to purchase an interest in property when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser." [Citing] Ringo *v.* Binns, 10 Pet. 269; Van Epps *v.* Van Epps, 9 Paige, 238; Torrey *v.* Bank of Orleans, 9 Paige, 649; s. c., on appeal, 7 Hill, 260; Carter *v.* Palmer, 1 Dru. & Walsh, 722; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C. 42; Gardner *v.* Ogden, 22 N. Y. 327; Anderson *v.* Lemon, 8 N. Y. 236.

strictly trustees, and their position being in every sense fiduciary, their contracts with the corporation should be scanned, if not with suspicion, at least with the most scrupulous care. The validity of such a contract must, therefore, depend upon the nature and terms of the contract itself, and the circumstances under which it is made. The motives of the parties are not necessarily material, but the effect of the provisions of the contract must be especially regarded, and if they are pernicious and tend to work a fraud on the rights of the corporation and stockholders, in such case the directors must be regarded as having no authority to enter into it." Applying these rules to the case in hand, the court held a contract made by a director with the corporation, granting to him enormous commissions without regard to the debts or other liabilities of the corporation, to affect injuriously the rights of the stockholders and to give this director a right, without regard to the rights of the creditors or the liabilities of the corporation, to be unreasonable and beyond the powers of his co-directors to make with him.

[2] Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. Rep. 286; s. c.,

directors of a manufacturing corporation and one other stockholder conceived the idea that more extensive works for their business should be erected. When submitted the proposition failed to receive the approval of the majority of the stockholders. Thereupon these parties, with their own funds, erected such buildings for the purpose of carrying on the same business. The corporation, through its meetings, afterwards determined to purchase this property of these directors and their associate. The latter sold it at a profit to the corporation, but not for an unconscionable price. The directors had refrained from voting in the meeting of stockholders which determined to purchase until it was ascertained by them that a majority of the stock represented favored the purchase. After a lapse of two years a stockholder sought to make these directors account for the profits they had made to the corporation. It was held in the United States Circuit Court for the western district of Pennsylvania that neither the stockholder nor the corporation was entitled to such relief, there having been shown no fraud, nor other conduct contrary to their duty growing out of their fiduciary character on the part of these directors in the transaction.[1] It appeared in another case in the federal court that one, acting as agent for the promoters who subsequently organized a corporation and became its original stockholders, made a contract with another corporation for a safety vault for the use of the corporation the promoters of which he represented. It was to be furnished for $7,250 cash; the agent induced them to give him a contract specifying the consideration to be $13,000, and also upon the statement a false credit of $5,750 as paid by him; for this latter sum he received from the company he represented shares of its stock at par value, which was issued to him in consideration of his supposed payment of that amount. In this action the corporation contracting with the agent was held liable to the company he represented for

7 C. C. A. 225, following Bank of Montreal *v.* J. E. Potts Salt & Lumber Co., 90 Mich. 345; s. c., 51 N. W. Rep. 512. That a contract is not made void by the simple fact that the president of a railroad corporation, unknown to the other directors, has an interest in a construction contract made with the corporation, see Augusta, T. & G. R. Co. *v.* Kittel, 52 Fed. Rep. 63; s. c., 2 U. S. App. 409; 2 C. C. A. 615.

[1] Barr *v.* Pittsburgh Plate Glass Co., (1892) 51 Fed. Rep. 33; affirmed by the United States Circuit Court of Appeals for the third circuit in Barr *v.* Pittsburgh Plate Glass Co., (1893) 57 Fed. Rep. 86; s. c., 6 C. C. A. 260.

the amount which he had thus fraudulently obtained from it. The court also held that the fact that the agent was also a stockholder in the plaintiff corporation did not affect its right to recover for the fraud perpetrated; and further, that where the fraudulent contract was made by defendant's president, who was its managing officer, and made its contracts, the defendant could not escape liability on the ground that this transaction was conducted by the president without its knowledge or concurrence.[1]

§ 185. Directors of an insolvent corporation preferring themselves to other creditors.— The majority of the directors of a manufacturing corporation organized under the laws of Illinois, with knowledge of its insolvency, paid off certain debts of the corporation, for which they were liable as guarantors, and took a judgment note of the corporation therefor, due one day after date, without grace, under which judgment was confessed in favor of such directors, and all the property of the company was levied on by execution issued on that judgment. The Supreme Court of Illinois held that the acts of the directors in attempting to secure themselves at the expense of other creditors were fraudulent and void, and were properly set aside at the instance of such other creditors.[2] The directors of an embar-

[1] Grand Rapids Safety Deposit Co. *v.* Cincinnati Safe & Lock Co., (1891) 45 Fed. Rep. 671.

[2] Roseboom *v.* Whittaker, (1890) 132 Ill. 81. BAILEY, J., for the court, in support of this holding, said: "There can be no doubt of the propriety of so much of the decree as declares the judgment by confession to be fraudulent and void as against the creditors of the corporation, and orders it to be vacated. This precise question was fully and elaborately discussed by this court in Beach *v.* Miller, 130 Ill. 162, and the rule there laid down must be held to control the present case. We there held that, so long as a corporation remains solvent, its directors may, with the knowledge of the stockholders, deal with the corporation, loan it money, take security or buy property of it, the same as a stranger; that, during the solvency of the corporation, the directors are the agents or trustees of the stockholders, and owe no duties or obligations to others, but that the instant the corporation becomes insolvent, their relations and duties become materially changed. The assets of the corporation then become a trust fund for the payment of its creditors, and the directors can no longer deal with them for their own advantage, or in such way as to gain priority for themselves over other creditors. They are then within the scope of that wise and equitable rule adopted by courts of equity for the protection of *cestui que trustent* or beneficiaries, which prohibits trustees and persons standing in similar fiduciary relations to exercise their powers or manage or appropriate the property of which they have control for their own profit or emolument,

rassed corporation, holding claims against it which they wished to protect, had the notes of the corporation payable to themselves drawn and antedated, and had them discounted by a bank. They then caused to be executed a deed of trust conveying all the assets of the corporation as security for these notes, among others. It was held in the United States Circuit Court for the western district of Missouri, in a proceeding by unsecured creditors to set it aside, that, being a security for debts upon which the directors were themselves liable as indorsers, it was, in effect, a preference to themselves, and fraudulent and void.[1]

or, as it is sometimes expressed, shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of the *cestui que trust.*"

[1] Consolidated Tank Line Co. *v.* Kansas City Varnish Co., (1891) 45 Fed. Rep. 7. PHILIPS, J., after referring to the apparent insolvency of the corporation, said: "When a corporation, in its business affairs, is thus *in articulo mortis*, whatever may yet be maintained on divided opinions as to its right to dispose of its property so as to give a preference to some general creditor, the law is too well settled, at least in this jurisdiction, to admit of extended discussion that its directors cannot make a disposition of the assets so as to secure themselves, directly or indirectly, a preference over general creditors. This is the rule of the Missouri courts. Williams *v.* Jones, 23 Mo. App. 132; Mill Co. *v.* Kampe, 38 Mo. App. 229; Roan *v.* Winn, 93 Mo. 503; s. c., 4 S. W. Rep. 736. It is not too much to say that it is the established doctrine of the federal courts. It is strongly maintained by Judge THAYER in the eastern district of this state. White, etc., Manufacturing Co. *v.* Pettes Importing Co., 30 Fed. Rep. 865; Adams *v.* Milling Co., 35 Fed. Rep. 433. See, also, Lippincott *v.* Carriage Co., 25 Fed. Rep. 577; Koehler *v.* Iron Co., 2 Black, 715–721; Railroad Co. *v.* Howard, 7 Wall. 392; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587. In Graham *v.* Railroad Co., 102 U. S. 161, Mr. Justice BRADLEY said: 'When a corporation becomes insolvent, it is so financially dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then take those trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. The most recent discussion of this question is to be found in the very able opinion of Judge WOODS, in Howe *v.* Tool Co., 44 Fed. Rep. 231. I cannot better express the strength of the reason why a director should not be permitted to prefer himself, under circumstances like those under review, than by quoting his language: 'A sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, or, it may be, exclusive, knowledge of the corporate affairs into means of self-protection, to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors, when asserted by a corporation, may

§ 186. Directors contracting with a syndicate composed of themselves — when such a contract cannot be rescinded. — One of the late cases before the New York Court of Appeals presents as facts that a railroad corporation of that state, through its directors, recognizing the importance of a connection by rail with another point, promoted the building of a street line of railway to accomplish this purpose. The directors of this road

not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests, I think, will compel its recognition and adoption. * * * Whether or not such preferences are fairly given is an impracticable inquiry, because there can be, in ordinary cases, no means of discovering the truth, and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that, in cases of insolvency, debts to directors, and liabilities in which they have a special interest, may first be discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organizations for the purpose, not only of escaping the ordinary risks of business done in the owner's name, which may be legitimate enough, but of enabling the promoters and managers, when failure comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides, in consistency with that equality which equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence.' The same thought was in the mind of Mr. Justice MILLER, in Sawyer *v.* Hoag, 17 Wall. 620, when he observed: 'When we consider the rapid development of corporations as instrumentalities of the commercial and business world, in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.' It was insisted on behalf of the banks that, although the deed of trust might be voidable as against the directors, yet the banks were to be regarded as *bona fide* purchasers. To this it was said: 'But are the banks such purchasers? In the first place, they parted with nothing on the faith of the deed. They loaned the money, as their evidence shows, on the indorsement of the directors. They never asked for this deed. They did not know of its existence until after it was executed and recorded. They may be accorded the presumption of the law in their favor that where such a deed is for their benefit, they are presumed to accept its provisions. But it is apparent on the face of the deed, and from the facts known to the banks, that the deed inured to the benefit of the directors as indorsers of the notes held by the banks. The banks could not, therefore, take without being privy to the wrong attempted by the directors. If the law were otherwise, the rule could be of no avail which seeks to prevent such directors 'from preferring debts in the payment of which they have a personal interest,' as declared in Adams *v.* Milling Co., 35 Fed. Rep. 435.'"

became the directors of the new corporation, and they arranged a plan by which the construction of the road was to be done by a syndicate composed of themselves, and when completed a contract of lease of this connecting road, which had $1,000,000 of bonds issued upon it and $500,000 of shares of stock, the lessee company guaranteeing interest of seven per cent upon the bonds and dividends of seven per cent upon the shares of stock, as a rental for the road. The main corporation, the lessee, going through insolvency, the hands of a receiver, and finally into a new corporation, it having been sold to a purchasing committee, and reorganized, continued to use the property leased. At the suggestion of the receiver the shares of the stock of the lessor company were purchased by the successors of the lessee company to such an amount as would give them control of the company, as a means of reducing the rental of this desirable and indispensable connection. The successors then suspended the payment of the guaranteed dividend upon the shares. This resulted in the bringing of this action by the few individual holders of the stock against the company then using the property under the lease to enforce a specific performance of the contract of guarantee of dividends. The one question as to the liability of the successor of the lessee company remaining, in the opinion of the court, was whether the taint of original fraud in the procurement of the lease operated to prevent the enforcement of the obligations of that instrument. In discussing the question, Gray, J., delivering the opinion, said: "That the contract of lease was voidable and quite indefensible because of the immoral conduct of the directors, who abused their trust in procuring its execution, I quite concede. The proofs could lead to no other finding than that the lease and the rental guarantee were the work of a combination or syndicate composed of members from the boards of directors of the two companies, who caused the same to be made by the [lessee company] for purposes of their own individual gain and in fraud of that company's rights. The identity of certain of the directors of each company when the lease was made, the interest of four of these common directors in the contract for the construction of the [lessor company's] road, and in the stock and bonds to be guaranteed, as a condition of the leasing of the road, stamped the whole transaction as a fraud upon the [lessee company], and brought it under the condemnation of the rule

which forbids those who fill fiduciary positions from making use of them to benefit their personal interests."[1] But while holding this contract of lease by the lessee railroad corporation and a guaranty of interest on bonds and dividends upon stock to be tainted with fraud by reason of the original transaction and voidable at the option of the lessee corporation, the Court of Appeals held that by acquiescence and use of the property for so long a time the complainant, successor to the original lessee, had so far ratified the contract that it could not ask of a court of equity to rescind it.[2]

§ 187. Directors issuing shares of stock to themselves.— A Kansas corporation, an agricultural society, had been organized with a capital stock of $5,000, divided into 1,000 shares of $5 each, and 590 shares of said stock were subscribed, but no notice was ever given and published where books of subscription would be open. The corporation continued in existence seven years, and became possessed of valuable real estate, and afterwards sold the same. After this sale, the officers and directors of the corporation, without the knowledge or consent of the other stockholders, issued to themselves the remaining stock at par value, and then declared a dividend upon the entire stock issued of $25 per share. In an action by a stockholder to enjoin these officers and directors from paying out such dividend and to cancel the stock issued to themselves, the Kansas Supreme Court held that the action of the officers and directors was without authority and in fraud of the rights of the other stockholders and a plain breach of duty upon the part of such officers.[3]

[1] Barr *v.* New York, L. E. & W. R. R. Co., (1891) 125 N. Y. 263, 274; s. c., 26 N. E. Rep. 145.

[2] Ibid.

[3] Arkansas Valley Agricultural Society *v.* Eichholtz, (1891) 45 Kans. 164. The directors claimed before the court that the taking of stock in a corporation stood upon a different footing than ordinary contracts of corporations in prosecuting the business enterprises for which they are organized; that any person has a right to subscribe for stock in any corporation, so long as there are shares to be taken; that the corporation has no power to prescribe the character or qualification of its stockholders; that the policy of the law, as declared by express terms of the statute, is to make corporations open to all persons alike to become members and stockholders, etc. The Supreme Court said: "This rule, as applied to the directors or officers of a corporation, cannot be upheld. The principle of public policy forbids transactions of this kind. It appears from the evidence that the property owned by this corporation had been sold, and the proceeds [of the sale]

§ 188. Officers profiting by their relation to the corporation.— The directors of a corporation cannot speculate with the funds or credit of the corporation and appropriate to themselves the profits of the speculation; neither can they make sales, as purchasers for the corporation, and take advantage of their position as directors, and either directly or indirectly speculate upon the corporation.[1] Holding the fiduciary relation they do to the stockholders of the corporation, its directors and managers cannot be permitted to acquire interests adverse to such relation.[2] Thus, a director contracting with certain parties for the construction of a railroad for the corporation he represents, cannot receive or

held by its officers. The assets at the time of the sale belonged to the then stockholders, and the directors and officers had no right to subscribe for the remaining stock at par, and enrich themselves to the detriment and loss of the other shareholders. The directors cannot lawfully benefit or favor any particular shareholder or class of shareholders. Every authority possessed by them is a power and discretion in the directors, who are trustees for the benefit of all the shareholders alike, which is to be exercised for the benefit of all of them. 1 Waterman on Corp. 620; Harris *v.* N. D. Rld. Co., 20 Beav. 384. The effort on the part of the directors and officers of a society to obtain the unsubscribed stock at par, when they knew that each share of the stock already issued was worth eighteen times its face value, was clearly a fraud upon the rights of the other stockholders, and a flagrant violation of their duties as directors and officers of such association. The officers and directors of a corporation are trustees of the stockholders, and in securing to themselves an advantage not common to all the stockholders, they commit a plain breach of duty. Koehler *v.* Iron Co., 2 Black, 715; Shorb *v.* Beaudry, 56 Cal. 446; 1 Morawetz Private Corp. § 518. The law does not permit directors to manage the affairs of a corporation for their personal and private advantage, and this rule, we think, applies to the disposition of unsubscribed stock, as well as to other contracts. The character and relation of directors and officers of a corporation require of them the highest and most scrupulous good faith in their transactions for the corporation and the stockholders." Hale *v.* Bridge Co., 8 Kans. 466, and authorities there cited; Ryan *v.* L. A. & N. W. Ry. Co., 21 Kans. 365; Hentig *v.* Sweet, 33 Kans. 244. As to what directors may do, see Holder *v.* La Fayette R. R. Co., 71 Ill. 106; Rollins *v.* Clay, 33 Me. 132; Abbott *v.* American Hard Rubber Co., 33 Barb. 578; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Taylor *v.* Miami Export Co., 5 Ohio, 162; 19 Cent. Law J. 305–310; 18 Cent. Law J. 130; Union Mut. Life Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537; Burke *v.* Smith, 16 Wall. 390; Penobscot R. Co. *v.* Dunn, 39 Me. 587.

[1] Redmond *v.* Dickerson, (1853) 9 N. J. Eq. 507. As to president and directors not being allowed to speculate in claims against the corporation, see McDonald *v.* Haughton, (1874) 70 N. C. 393.

[2] European & North American Ry. Co. *v.* Poor, 59 Me. 277.

retain any part of the profits arising from the contract for his personal use and benefit.[1] Where directors of a ferry company, in their individual names bought a steamboat, and then, as directors, purchased it of themselves for the corporation at a large advance on its cost and value, the transaction was held to be a fraudulent one; it was held, also, that the profits made by the directors inured to the benefit of the corporation, and that the latter could recover the profits from them, with interest.[2] The rule generally is that one acting in a representative or fiduciary capacity is not allowed so to deal with the subject-matter of his agency or trust as to benefit himself privately, and an agent or trustee who thus makes a profit out of his agency or trusteeship must account for the same to his principal or *cestui que trust;* and it may be conceded that the rule applies, as a principle of public policy, without regard to the actual fairness of the transaction, or the merits of the services rendered, or the price paid, in case of a sale or purchase.[3] Where it was represented by promoters of a mining corporation, who afterwards became its trustees, that it would take the proceeds of the whole of its capital stock to purchase certain mining properties, and the trustee, to whom the whole stock was turned over for the purpose, actually purchased it with the payments made for certain shares of stock, less than half the issue, and appropriated the rest of the shares of stock to himself and others, without actually paying any money, and concealed the facts from the stockholders who had paid for their shares, it was held that

[1] Ibid.

[2] Parker *v.* Nickerson, (1873) 112 Mass. 195.

[3] Bristol *v.* Scranton, (1893) 57 Fed. Rep. 70, 78; citing Sugden *v.* Crossland, 3 Smale & G. 192; McKay's Case, 2 Ch. Div. 5; Pearson's Case, 3 Ch. Div. 807; Parker *v.* McKenna, L. R., 10 Ch. App. 96; Iron Works Co. *v.* Grave, 12 Ch. Div. 738, 746; Railway Co. *v.* Blakie, 1 Macq. 461; Wardell *v.* Railroad Co., 103 U. S. 651, 658. In Keokuk Northern Line Packet Co. *v.* Davidson, 95 Mo. 467; s. c., 8 S. W. Rep. 545, it was held that the president of the packet company, after having endeavored to obtain contracts for carrying the mails for the company, was not precluded from making such contracts in his own name, but, having done so, he using all the facilities afforded by the company in performing them, would not be allowed to make profit out of such use, but would be held to account to the company for all that he received for the services performed by it. For an illustration of what will not be held a fraudulent sale to a corporation, where parties purchasing property at a low figure before the organization of a corporation sold it at a much larger figure to the corporation, but there was some evidence of fraud or deception, see Stewart *v.* St. Louis, Fort Scott & W. R. Co., 41 Fed. Rep. 736.

this defendant occupied a fiduciary relation to the corporation and the subscribers, and could not, nor could his associates, who were also familiar with the facts, make, through concealment from the subscribers, any profit from the transaction, and they should be held accountable for the stock which they had retained, or its proceeds.[1] The law will not permit, for instance, one in whose person are vested the offices of vice-president and treasurer of a corporation with the management and control of the corporation

[1] Brewster v. Hatch, (Sp. Term Sup. Ct. 1881) 10 Abb. N. C. 400; citing Blake v. Buffalo Creek R. R. Co., 56 N. Y. 485; Cumberland Coal & Iron Co. v. Sherman, 30 Barb. 553; Bagnall v. Carlton, L. R., 6 Ch. Div. 371; Erlanger v. New Sombrero Phosphate Co., L. R., 3 App. Cas. 1218; Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 202. In East New York & Jamaica R. R. Co. v. Elmore, (1875) 5 Hun, 214, it appeared that the corporation had subscribers for seventy-two shares of its stock, who had agreed to pay par value for it. All the shares within its power to issue having been already issued, the treasurer and president purchased the number of shares at a price far below par, and transferred them to those subscribers on the corporation's books, charging the corporation par value for them. In an action against the treasurer to recover the profits he made in the transaction, it was held that the treasurer could not, by charging over the stock at its par value, make the corporation his debtor, and thus extinguish his liability for moneys received by him or its treasurer. For an illustration of when a purchase by one trustee, and, at the same time treasurer, of a corporation in his own behalf will inure to the benefit of the corporation, see Einsphar et al., Trustees First German Lutheran Zion Church of Adams Co. v. Wagner, (1882) 12 Neb. 458. As to when and the circumstances under which a mortgage of the personal property of a corporation executed to its president, who was also a director, by his vote and that of another of the three directors, will be held fraudulent, see Burley v. Marsh, (1881) 11 Neb. 291. As to officers and stockholders contracting with corporation, see Charter Gas-Engine Co. v. Charter, 47 Ill. App. 36; Central Trust Co. v. Bridges, 57 Fed. Rep. 753; s. c., 6 C. C. A. 539; Barr v. Pittsburgh Plate Glass Co., 57 Fed. Rep. 86; s. c., 6 C. C. A. 260; Foster v. Belcher's Sugar Refining Co., 118 Mo. 238; s. c., 24 S. W. Rep. 63; Wile & Brickner Co. v. Rochester & K. F. Land Co., 4 Misc. Rep. 570; s. c., 25 N. Y. Supp. 794; Milbank v. Welch, 74 Hun, 497; s. c., 26 N. Y. Supp. 705. As to directors dealing with themselves or acting in matters where they are interested, see Coleman v. Second Avenue R. R. Co., 38 N. Y. 201; Blatchford v. Ross, 5 Abb. Pr. (N. S.) 434; s. c., 37 How. Pr. 110; 54 Barb. 42; Ogden v. Murray, 39 N. Y. 202; Bliss v. Matteson, 45 N. Y. 22. As to various rules governing contracts in which directors have an interest, see Duncomb v. New York, Housatonic & Northern R. R. Co., 84 N. Y. 190; Western R. R. Co. v. Bayne, 11 Hun, 166; Barnes v. Brown, 80 N. Y. 527. As to a contract with a corporation entered into at a special meeting of directors being void because of absent directors not having notice, see Hill v. Rich Hill Coal Min. Co., (Mo. 1894) 24 S. W. Rep. 223; Minneapolis Times Co. v. Nimocks, 53 Minn. 381.

also allowed him, to so manage the affairs of the corporation as to result to his own pecuniary advantage. And in case such an officer speculate in the funds of the corporation, or buy claims against it at a discount, he will be required to account to the creditors or stockholders of the corporation for any profit that results from such transactions.[1] The contract made by a director of a corporation to secure a personal advantage to himself will be

[1] Thomas *v.* Sweet, (1887) 37 Kans. 183; s. c., 14 Pac. Rep. 545. For a strong opinion on the subject of the duties of officers to the corporation, see Ryan *v.* L., A. & N. W. Ry. Co., 21 Kans. 365. In Powell *v.* Willamette Valley R. R. Co., (1887) 15 Or. 393; s. c., 15 Pac. Rep. 663, where the attorney, who was also a director in an insolvent corporation, had been employed by third parties to buy up the claims of creditors of the corporation with a view to its reorganization, it was held that his relation to the company required of him the utmost good faith towards the creditors of the company in his dealings with them in the matter, but where they had received all that their claims were worth, the fact that he had not informed them of the contemplated reorganization would not constitute a fraud upon the creditors upon this attorney and director's part. In Smith *v.* Los Angeles Immigration & Land Co-operative Assn., (1889) 78 Cal. 289; s. c., 20 Pac. Rep. 677, a resolution of a quorum of four directors, authorizing renewal of notes of the corporation in favor of two of the four directors, was held to be void and of no effect. In Rudd *v.* Robinson, (1889) 54 Hun, 339; s. c., 7 N. Y. Supp. 535, the corporation had been formed under the laws of New York, and succeeded to the business of a firm. One holding a claim against this firm was a trustee of the corporation, and with two others of the board constituted a majority. These two, it was shown, represented the first named, or acted in concert with him in any matters in which he was interested. He had from time to time aided with money the corporation upon call. Finally he had had action taken by the board of trustees, by which he had himself paid a debt out of the corporation's funds which he held against the firm which it succeeded. The Supreme Court of New York held that he should account to the receiver of the corporation for this money received for this debt of the firm, together with interest upon it, and also for all excess of interest over and above legal interest which, through the action of himself and other trustees, he had received upon moneys advanced to the corporation, as also the profits he had received in certain transactions and "ventures" in which he had advanced the money and arranged for a division of the profits between himself and the corporation, upon the ground that he had no right to share in the profits of the business which belonged exclusively to the corporation itself. An illustration of when the profits of a director must inure to the benefit of the corporation: Paducah Land, Coal & Iron Co. *v.* Hays, (Ky. 1893) 24 S. W. Rep. 237. As to the effect of laches of a stockholder in complaining of a profit made by a director in connection with a sale of the stock of a corporation, and an illustration of what a director might do for which he would not be held accountable, see Keeney *v.* Converse, (1894) 99 Mich. 316; s. c., 58 N. W. Rep. 325.

held to be void or to inure to the advantage of the corporation.[1] An agreement made by a majority of the directors of a corporation among themselves, privately and unofficially, that they should be paid a percentage upon all the money raised upon the credit of a bond of indemnity, signed by them, against the future indebtedness of the corporation, has been held not to be binding upon the corporation.[2] Directors or other officers of a corporation contracting with another for work and material, paying an excessive price for the same, and reserving to themselves a discount or commission, will be held to an accountability to the corporation for what they have profited.[3] Where directors own all

[1] Sargent *v.* Kansas Midland R. R. Co., (1891) 48 Kans. 672; s. c., 29 Pac. Rep. 1063.

[2] Butler *v.* Cornwall Iron Co, (1853) 22 Conn. 335.

[3] Perry *v.* Tuskaloosa Cotton Seed Oil Mill Co., (1890) 93 Ala. 364; s. c., 9 So. Rep. 217. In Farmers & Merchants' Bank of Los Angeles *v.* Downey, (1879) 53 Cal. 466, where a director of the bank who had taken from the borrowers a note running to the bank for the principal sum loaned, at a rate of interest therein stipulated, but at the same time, and as part of the same transaction, made an agreement with the borrowers that they should permit him to participate with them in the profits of a purchase and sale of certain lands, it was held that he could not be permitted to retain for himself the profits thus contracted for, but must surrender those profits to the bank for the benefit of all the stockholders. As to a city treasurer making profit on public funds, see City of Chicago *v.* Gage, 95 Ill. 593. As to officers accounting to the corporation or stockholders or creditors of the corporation for profits growing out of transactions in behalf of the corporation in which they are interested, see Ward *v.* Davidson, (1890) 89 Mo. 445; s. c., 1 S. W. Rep. 846. In Hutchinson *v.* Bidwell, (1893) 24 Or. 219; s. c., 33 Pac. Rep. 560, it appeared that the directors of an insolvent milling company leased the corporate property to themselves and operated the plant at a profit. The Supreme Court held that the directors were liable to account to the creditors of the corporation for the profits under the lease. In McClure *v.* Levy, (1894) 79 Hun, 235; s. c., 29 N. Y. Supp. 352, it appeared that one who had secured his election as president of a life insurance association and secured a board of directors subservient to his will, had gained possession of certain notes of the association which he had full knowledge could not be paid out of the reserve fund of the association. He had this board order the payment of the notes by drawing all the funds the association had in bank properly belonging to the reserve fund in his favor. The Supreme Court of New York in General Term held that the receiver of the association was entitled to recover from him the money thus wrongfully misappropriated through his and other willing directors' action. That a president and vice-president of a railroad company who had arranged to use certain bonds of the company secured by mortgages for their own private use instead of improving the railroad property, has been held to be such a fraud on the mortgage trustee and the bondholders as would enable a

the stock of a corporation they are not within the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their *cestui que trust.*[1]

court of equity, at the suit of one of the bondholders, to compel them to appropriate the proceeds of the bonds thus unlawfully diverted to the purpose specified in the mortgage. Belden *v.* Burke, 72 Hun, 51; s. c., 25 N. Y. Supp. 601. It was held in Paducah Land, Coal & Iron Co. *v.* Mulholland, (Ky. 1894) 24 S. W. Rep. 624, that stock which was returned to directors purchasing land for the corporation to be used for their own personal benefit, should be surrendered for cancellation unless in the hands of *bona fide* purchasers for value. For a case holding that the acts of the president and trustees of a corporation in a reorganization, of the same, were not fraudulent, although a large personal profit accrued therefrom to the president who was the principal promoter of the reorganization, see Symmes *v.* Union Trust Co., 60 Fed. Rep. 830.

[1] McCracken *v.* Robison, 57 Fed. Rep. 375; s. c., 6 C. C. A. 400. That directors in a private corporation have no right, under any circumstances, to use their official position for their own individual benefit, see Hoffman *v.* Reichert, (1893) 147 Ill. 274; Gilman, Clinton & Springfield R. R. Co. *v.* Kelly, 77 Ill. 426, 434; Hoyle *v.* Plattsburg & Montreal R. R. Co., 54 N. Y. 314; Oliver *v.* Piatt, 3 How. 333; Speidel *v.* Henrici, 120 U. S. 377, 386; Railroad Co. *v.* Durant, 95 U. S. 576; Van Epps *v.* Van Epps, 9 Paige, 241. Contracts of corporations made with officers. President, etc., *v.* Ry. Co., 44 Cal. 106; Pickett *v.* School District, 25 Wis. 552; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553; Port *v.* Russell, 36 Ind. 64; Railway Co. *v.* Poor, 59 Me. 277; Gardner *v.* Butler, 30 N. J. Eq. 702; Davis *v.* Mining Co., 55 Cal. 359; Copeland *v.* Manufacturing Co., 47 Hun, 235; Thomas *v.* Railway Co., 1 McCrary, 392. That they are not absolutely void: Bundy *v.* Jackson, 24 Fed. Rep. 628; Bank *v.* Patterson, 7 Cranch, 299; Canal Bridge *v.* Gordon, 1 Pick. 296; Harts *v.* Brown, 77 Ill. 226. What may make them valid: 1 Beach on Priv. Corp. 402; Battelle *v.* Northwestern Cement Co., 37 Minn. 89; Pneumatic Gas Co. *v.* Berry, 113 U. S. 322; Knowles *v.* Duffy, 40 Hun, 485; Santa Cruz Co. *v.* Spreckles, 65 Cal. 193; Hill *v.* Nisbet, 100 Ind. 341; Richardson *v.* Green, 133 U. S. 30; Union Mut. Life Ins. Co. *v.* White, 106 Ill. 68; Smith *v.* Smith, 62 Ill. 493; Addison *v.* Lewis, 75 Va. 701; Stratton *v.* Allen, 16 N. J. Eq. 229. As to the effect of directors or other officers of corporation being interested in contracts, see County Court *v.* Baltimore & Ohio R. R. Co., 35 Fed. Rep. 161; Holt *v.* Bennett, 146 Mass. 436; s. c., 16 N. E. Rep. 5; Hancock *v.* Holbrook, 40 La. Ann. 53; s. c., 3 So. Rep. 351; Wasatch Min. Co. *v.* Jennings, 5 Utah, 385; s. c., 16 Pac. Rep. 399. As to a director dealing with the corporation for his own profit, see Schetter *v.* Southern Oregon Improvement Co., (1889) 19 Or. 192; s. c., 24 Pac. Rep. 25. As to a president and trustee joining in voting himself compensation for services, see Copeland *v.* Johnson Manufacturing Co., (1890) 47 Hun, 235. Transactions by officers with corporations: Raymond *v.* San Gabriel Val. Land & Water Co., 53 Fed. Rep. 883; Langan *v.* Francklyn, 29 Abb. N. C. 102; s. c., 20 N. Y. Supp. 404; Miner *v.* Belle Isle Ice Co., 93 Mich. 97; s. c., 53 N. W. Rep. 218; Beers *v.* New York Life Ins. Co., 66 Hun, 75; s. c., 20 N. Y. Supp. 788; Main Jellico Mountain Coal Co. *v.* Lotspeich, (Ky. 1894) 20 S. W. Rep. 377; Prince

§ 189. Repudiating or avoiding contracts made by officers with themselves.— A contract made by a director of a corporation with himself may be repudiated by the corporation at the instance of the stockholders.[1] If the directors of a corporation exceed their authority or are recreant to their trust, the corporation may repudiate their fraudulent contracts.[2] Contracts made by the directors of a corporation with one of their number are voidable at the election of the corporation, without reference to the question whether or not they are beneficial to the corporation.[3] This doctrine may be applied where the contract is made by nominal directors who are in fact the mere instruments of the other contracting party, and act under his directions and as he wishes, in pursuance of a scheme planned by him by which they were placed in office, and a contract thus made would be voidable at the election of the corporation without proof of unfairness or fraud.[4] In order to defeat a contract entered into by its directors or in its behalf, in which one or more of them had a private interest, a corporation is not bound to show that the influence of the director or directors having the private interest determined the board's action.[5]

Manufg. Co. *v.* Prince's Metallic Paint Co., 20 N. Y. Supp. 462; Hannerty *v.* Theater Co., 109 Mo. 297; Societe des Mines D'Argent et Fonderies de Bingham *v.* Mackintosh, 7 Utah, 35.

[1] Gardner *v.* Butler, 30 N. J. Eq. 702; Guild *v.* Parker, 43 N. J. Law, 430.

[2] Metropolitan Elevated Ry. Co. *v.* Manhattan Ry. Co., (Spl. Term Sup. Ct. 1884) 14 Abb. N. C. 103, 212.

[3] Central Trust Co. *v.* N. Y. City & Northern R. R. Co., (Spl. Term Sup. Ct. 1887) 18 Abb. N. C. 381.

[4] Ibid.

[5] Munson *v.* Syracuse, Geneva & Corning R. R. Co., (1886) 103 N. Y. 58; s. c., 8 N. E. Rep. 355, affirming 29 Hun, 76; s. c., 16 N. Y. Wkly. Dig. 212. ANDREWS, J., said: "The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity to enforce the contract in the making of which he participated. The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative. This rule has been declared and enforced in a great variety of cases, but in none perhaps with more vigor and completeness, but upon principle and authority, than in the leading case of Davoue *v.* Fanning, 2 Johns. Ch. 251, 252. But the case of Aberdeen Railway Company *v.* Blakie & Others, 2 Eq. 1281, decided by the

§ 190. **Rules as to such contracts.**—The relation as a director and officer to a corporation does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care, and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company, as well as of its creditors, and not solely with a view to his own

House of Lords, is in many of its features similar to the present one. In that case it appeared that the plaintiffs were a manufacturing firm, and that one of them was also a manager of the Aberdeen Railway Company, the defendant, and the chairman of the board. At a meeting of the managers, they by resolution authorized their engineer to contract for iron chairs needed by the company. The agent contracted with the plaintiffs' firm. It did not appear that the member of the firm, who was also a manager and the chairman of the company, intermeddled with the dealing on either side, further than that it may be assumed he was at the meeting which authorized the engineer to procure a supply of chairs. The plaintiffs brought their suit to enforce specifically the performance of the contract, or in the alternative to recover damages for its non-performance. After a decision in their favor in the lower court, the company appealed to the House of Lords, where the ruling was unanimously reversed on the ground that the contract was condemned by the rules of equity, as having been made between the company of which one of the plaintiffs was a manager and a private firm of which he was a member. The opinions of Lord Chancellor CRANWORTH and of Lord BROUGHAM vindicate upon impregnable grounds the general rule and its application to the particular case." VAN BRUNT, J., in Metropolitan Elevated Ry. Co. *v.* Manhattan Ry. Co., (Spl. Term Sup. Ct. 1884) 14 Abb. N. C. 103, 272, said: "The undoubted rule of law in this state is, that every contract entered into by a director with his corporation may be avoided by the corporation within a reasonable time, irrespective of the merits of the contract itself. * * * I can see no difference in principle between the case of a director contracting with his corporation and that of directors of one corporation contracting with themselves as directors of another corporation. The evils to be avoided are the same, the temptations to a breach of trust are the same, the want of independent action exists, and the divided allegiance is just as apparent." As to rules governing where directors act in their own interest, see March *v.* Eastern Railroad, 43 N. H. 515; Fisher *v.* Concord Railroad, 50 N. H. 200; Richards *v.* New Hampshire Ins. Co., 43 N. H. 263; Ashuelot Railroad *v.* Elliott, 57 N. H. 397. As to the acts of school trustees, so far as they should be beneficial to themselves, being void, see Rhodes *v.* McDonald, 2 Cushman, (Miss.) 418. As to contracts between a director and a corporation, being voidable only, see Stewart *v.* Lehigh Valley R. R. Co., (1876) 38 N. J. Law, 505.

benefit, they refuse to lend their aid to its enforcement.[1] In this case, plaintiff's testator loaned to a railway corporation $100,000 upon its notes, and received from it 1,250 shares of paid-up stock as a bonus, and 200 mortgage bonds of the corporation, and the practical control of its board of directors. After this, he demanded of this board 100 more bonds, as further collateral, and they agreed to it. Subsequently, this board allowed him to have 300 more bonds, as collateral security for further advances of money, but he made no such further advances of money to the corporation. These 400 bonds he obtained at a time when he was acting as, and claiming to be, the treasurer of the corporation. After the corporation became insolvent he claimed to hold these 400 bonds, individually, as collateral for his debt. The Supreme Court of the United States held that, as between him and the creditors of the railway corporation, he could not, under the circumstances, hold them as collateral for his debt.[2] Promoters of a corporation, not representing it in any relation of agency, have no authority to enter into preliminary contracts binding the corporation, when it shall come into exist-

[1] Mr. Justice LAMAR, in Richardson's Executor *v.* Green, (1890) 133 U. S. 30; s. c., 10 Sup. Ct. Rep. 280.

[2] Ibid. Speaking for the court, Mr. Justice LAMAR said: "We do not deny that cases may arise in which, if everything were admitted to be fairly done, with the knowledge and acquiescence of the company, such a personal possession as that which Richardson obtained, although not such an actual delivery as the board had intended and directed, might be considered as equivalent to a legal delivery. But under the special circumstances of this case, in view of the unfair means employed by Richardson to have the entire body of the company's bonds transferred from the custody of Ferry [the treasurer] into his own custody, and the clandestine manner in which he took out the 400 bonds from that body, not only without notice of the fact to the company, but with an implied, if not an expressed, denial of the transactions, we do not think that he can be regarded as standing in the position of a legal and equitable pledgee, or that he ever acquired, as such pledgee, a lien on the 400 bonds. But even if there could be any doubt on this point, Richardson, himself, by his own act, has removed it. He waived and abandoned all claim to any lien, as a pledgee, by his voluntary surrender and delivery of the bonds to the sheriff of the county of New York, as the property of the company, to be sold under execution. If the 400 bonds were not delivered to Richardson, as we think the court below correctly held, it follows that the unissued bonds were not subject to attachment or to execution as valid and binding obligations against the company, and that Richardson's purchase at the sheriff's sale vested in him no title or ownership to them." See, as to the title of Richardson to these bonds, and their sale under execution, Sickles *v.* Richardson, (1881) 23 Hun, 559.

ence, and if the sanction of the corporation to such a contract is obtained by the act or co-operation of a director who has a private interest, the corporation may resist an action for specific performance, at least, in a case where it has not accepted the consideration, or taken the benefit of the contract.[1]

§ 191. Circumstances under which the directors cannot avail themselves of the defense of the invalidity of the contract.— It appeared in an action in the federal court upon a contract, that a railroad company, a corporation in form only, by its president, entered into a construction contract, whereby the contractors agreed to complete the superstructure of the road, furnish materials and equip it by a certain date, and in payment therefor certificates for a fixed amount of its full paid-up stock and the same amount of first mortgage bonds were to be delivered to them. Contemporaneously with the making of this contract, and on the same day, the contractors agreed with one acting on behalf of certain directors who were the actual stockholders, that if the contract were complied with by the company, they would pay to him one-half of the net profits realized from

[1] Munson *v.* Syracuse, Geneva & Corning R. R. Co., (1886) 103 N. Y. 58; s. c., 8 N. E. Rep. 355, affirming 29 Hun, 76; s. c., 16 N. Y. Wkly. Dig. 212. Andrews, J., referring to this director, said: "He stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry, and it leaves, neither to judge nor jury, the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall." As to contracts of officers dealing with themselves being voidable at the option of the corporation, see Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48. In Pneumatic Gas Co. *v.* Berry, (1885) 113 U. S. 322; s. c., 5 Sup. Ct. Rep. 525, a release by the corporation to one of its directors of all claims, equitable or otherwise, arising out of transactions under a contract between the corporation and the director, made in excess of its corporate powers, was held to be valid, if made in good faith, and without fraud or concealment. As to contracts in which the interest of directors are adverse to the corporation being voidable, at the option of the corporation or, upon its refusal, by a minority of stockholders, see Graves *v.* Mono Lake Hydraulic Mining Co., (1890) 81 Cal. 303; s. c., 22 Pac. Rep. 665.

the contract, out of the stocks and bonds. The road was completed and it was agreed between the parties that the share of the directors in the net profits should be fixed at $150,000, for which the contractors were to give these notes. The latter paid $50,000 on this substituted contract, and this action was to recover of them the balance. SHIPMAN, C. J., for the United States Circuit Court of Appeals, refers to the defense made in these words: "The defense made, as a matter of law, was the invalidity of the contracts [original and substituted], because by the original contracts four directors had secretly provided for one-half of the profits which should arise out of the construction of the road, and it was claimed there could be no recovery, because the contract being void, no action could be maintained upon it or upon its successor." It was held that the principle which denounces the action of directors of a corporation who, professing to be its agents, and to be contracting in its behalf, secretly agree for a private and personal benefit to themselves, or agree to sell their official influence for personal gain, was not available as a defense by the directors in this particular case.[1]

[1] Robison *v.* McCracken, (1892) 52 Fed. Rep. 726. SHIPMAN, C. J., said: "The decisions of the courts of the United States have been most strenuous in demanding that the directors of corporations shall act disinterestedly in contracts which they make in behalf of the corporation for which they act, and in setting aside tainted contracts between a director or an agent and a third person for the sale of official influence. Wardell *v.* Railroad Co., 103 U. S. 651; Thomas *v.* Railroad Co., 109 U. S. 522; s. c., 3 Sup. Ct. Rep. 315; Woodstock Iron Co. *v.* Richmond & Danville Extension Co., 129 U. S. 643; s. c., 9 Sup. Ct. Rep. 402; West *v.* Camden, 135 U. S. 507; s. c., 10 Sup. Ct. Rep. 838; Providence Tool Co. *v.* Norris, 2 Wall. 45." The present case was there distinguished from those just cited: "It is manifest that the facts in this case are of a different character from those which have ordinarily marked contracts which are the subject of just rebuke by courts. The corporation which entered into the construction contract was one in form only, and the agreement for construction and division of the profits was, in fact, made by all the stockholders, if Mason [another of the original subscribers] was not a stockholder. But, assuming the existence of Mason's character as a stockholder, and that an exorbitant contract of the entire body of stockholders for their own pecuniary benefit can be seasonably attached [attacked ?] by existing creditors, it is well settled that, as a general rule, contracts of a corporation, which which were made by directors who obtained a personal pecuniary benefit thereby, are not, on that account alone, void, but are voidable at the election of the parties who are affected by the fraud. This is clearly announced in Barnes *v.* Brown, 80 N. Y. 527; Barr *v.* Railroad Co., 125 N.Y. 263; s. c., 26 N.E. Rep. 145; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, and Thomas *v.* Railroad Co., 109 U. S.

§ 192. Purchase by officers of debts due by, or property of, corporations.— A director may trade with, borrow from or loan money to a corporation on the same terms and in like manner as other persons. In loaning money to the corporation, however, he must act fairly and be free from all fraud and oppression; and in so doing must act for the interest of the corporation and impose no unfair or unreasonable terms.[1] Directors may purchase the bonds issued by a corporation or other of its indebtedness in whatever form it exists. And if such bonds or indebtedness is secured by a trust deed, for instance, they have a right to proceed, if necessary, to sell the property for the satisfaction of such indebtedness as any other person.[2] If the corporation has money or property which can be converted into money with which to redeem its property from a judicial sale or from the lien of the trust deed, a purchase of the bonds or other indebtedness by directors, as a means of acquiring through a sale the property of the corporation, would be in bad faith, and a

522; s. c., 3 Sup. Ct. Rep. 315. In the latter case it is said, in substance, that those for whom the agent was acting have the option to avoid such a contract, but until they exercise their option, and reasonably show that it is their purpose not to submit to the act of the agent, the contract is in existence, and is not a nullity. In this case, Mason, the remaining stockholder at the time, has not dissented, but desires to enjoy the contract. The corporation has never dissented. [The contractors] to whom the whole stock was issued, made both contracts, paid $50,000 upon the [substituted] contract, the last payment being nine months after its date. Neither creditors nor the present stockholders have ever dissented. The case clearly falls within the general rule which has been cited. It contains no circumstances which create an exception, and make the contract one which is absolutely void. The condition of the defendants is this: They made a voidable contract with the plaintiff, which has not been avoided. The contract is an executed one; the defendants received and sold the entire stock and bonds of the company and have the fruits of the contract, a part of which they have paid, and the residue of which they refuse to pay, upon the ground that the contract was illegal in its relations to the corporation. Cases may arise where a court will have nothing to do with the controversies in regard to the proceeds of a business of an inherently corrupt and wicked character, but this is not one of them. The weakness of the defendants' position is clearly disclosed in McBlair *v.* Gibbes, 17 How 232; Brooks *v.* Martin, 2 Wall. 70; Planters' Bank *v.* Union Bank, 16 Wall. 483, and Railroad Co. *v.* Durant, 95 U. S. 579. In the latter case the court said: 'The appellee cannot claim adversely to those for whom he acquired and holds the property. The rights of others, if such rights exist, do not concern him. He cannot vicariously assert them.'"

[1] Harts *v.* Brown, (1875) 77 Ill. 226.

[2] Ibid.

purchase by them of the property under such circumstances would not be sustained.[1] And if a sale were necessary by reason of a lack of means on the part of the corporation to relieve the property from the liens and prevent a sale of property beyond the amount necessary to pay the debts secured by the trust deed, though made with the assent and by direction of the directors, and they purchase it, the sale in this respect would be void, as it would be a sale to that extent in which the directors would be the vendors, and they could not purchase of themselves.[2] A trustee of a corporation may purchase with his own funds a judgment which has been recovered against the corporation for less than the amount due thereon, and in case he assigns it to a third person, the assignee may enforce the judgment against the corporation for the full amount due upon it.[3] In case a director or trus-

[1] Ibid.

[2] Ibid.

[3] Inglehart *v.* Thousand Island Hotel Co., (1884) 32 Hun, 377. The Supreme Court of New York in General Term have said upon this subject: "That a trustee of a corporation organized under the general laws of this state acts in a fiduciary character, is not a subject of doubt, as he is intrusted with power and authority to be exercised in the interest of the stockholders and creditors of the company. In dealing with its property and in the management of its affairs he is subject to the obligations and disabilities incident to that relation, and he must so act as not to permit himself or his own private interests to interfere or compete with his duty to the company. [Citing] Hoyle *v.* Plattsburgh & Montreal R. R. Co., 54 N. Y. 314; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553; Twin-Lick Oil Co. v. Marbury, 91 U. S. 588. It is not, however, deemed to be inconsistent with the duties which a trustee owes a company to loan and advance to it moneys to be used in transacting its legitimate business and to meet its financial wants and receive security therefor by mortgage or pledge of the assets of the company. By fair dealing and in the legitimate business of the company he may become one of its creditors. Transactions of this character between an officer of the company and the company itself are of frequent occurrence, and have received the approval and sanction of the courts as appropriate and not inconsistent with the duty which a trustee owes to the stockholders and creditors of the company. [Citing] Duncomb *v.* N. Y., H. & N. R. R. Co., 84 N. Y. 190; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 588. So also a trustee or director may, with his own money, purchase for himself of a third person a valid and subsisting outstanding debt owing by the company and secure a perfect title thereto. Such a transaction is not even a ground for entertaining the suspicion that it is in violation of any duty which he owes the corporation, and there is no presumption of law against its fairness. If the obligation is valid the owner may sell and transfer it to any one who is willing to become a purchaser, and he thereby secures an unquestionable title. [Citing] cases *supra;* Clark *v.* Flint & Pere Marquette R. Co., 5 Hun, 556. The other question to be considered in this connection is, will the

tee of a corporation seek the enforcement of a judgment against it owned by himself by a sale of the property or assets of the corporation, it would be incumbent upon him to act with the greatest fairness and publicity and to do everything reasonable within his power to secure the highest price for the property sold; and if he should be guilty of any improper conduct by which he secures to himself the property of the corporation for less than its fair market value, the sale may be set aside on the application of any of the parties interested.[1] One of the appellate courts of Missouri reversed a judgment in the court below, and held that the president of a corporation who had voluntarily purchased a small debt against the corporation should be enjoined from levying an execution for the payment of a balance on the claim where he had already taken valuable property of the corporation in part payment of it.

trustee or director be permitted to enforce a collection of the debt thus acquired for its entire amount, or shall he be limited to the sum which he actually paid for the debt or obligation? I am unable to discover any good reason why he should not be permitted to enforce judgment for the full amount, nor can I find any decision limiting the trustee to the sum actually paid. In these times a large proportion of the mercantile, commercial and manufacturing business of the country is carried on by corporations, and many of them issue, in large amounts, securities in the form of negotiable instruments, payable in the future, which are purchased and held as investments by capitalists and others, and it has never been questioned but that a director in a corporation of this character might purchase the same of a third person at a discount, and collect from the company the entire sum secured thereby."

[1] Inglehart *v.* Thousand Island Hotel Co., (1884) 32 Hun, 377.

[2] Brewster *v.* Stratman, (1877) 4 Mo. App. 41. LEWIS, P. J., said: "The fiduciary position held by the president of a corporation does not admit of his speculating in either its assets or its indebtedness, for his own benefit, at the expense of the corporation. He is a trustee, and as such can never be permitted to create such a relation between himself and the trust property as will make his own interest necessarily and effectually antagonistic to that of his beneficiary. In Covington & Lexington Railroad Co. *v.* Bowler, 9 Bush (Ky.), 468, a director had purchased at a judicial sale the railroad belonging to his corporation. It was held, upon the principle just stated, that the corporation had a right to have its road surrendered to it upon placing the director *in statu quo.* * * * In McAllen *v.* Woodcock, a suit in ejectment, 60 Mo. 174, it was held that where, under execution against a corporation, its land was purchased by one who was a stockholder and treasurer of the company, the purchase must be regarded as having been made for the benefit of the association, and that the title thus acquired could not be considered as hostile thereto." In Lingle *v.* National Insurance Co., 45 Mo. 109, the Supreme Court of Missouri affirmed the judgment of the court below awarding out of the assets

§ 193. Purchase and sale of property of corporation by officers.— Where a sale of the property of a corporation to raise money to pay its debts may become necessary on account of the mismanagement of its affairs by the directors, and those directors for that purpose sell it to one of their number, the sale may be set aside.[1] For a sale and purchase under such circumstances to stand, it must be shown that there was a necessity for the sale and that the property of the corporation was bought by the directors in open market at a fair price and without any undue advantage, in good faith and without the slightest unfairness.[2] A director of an insolvent corporation, buying its property at a sale under execution to which he is not a party, will be liable to the corporation for the value of the property less what he may have paid for it.[3] In case directors of a corporation divert its property from the payment of its debts, by which diversion creditors may be deprived of the opportunity to enforce their debts the injured creditors may have relief through a court of equity.[4] Should such a diversion of the corporate property charged to be injurious to the creditors be a sale of such property to one of the directors taking part in the transaction as buyer and seller, the directors must establish both the good faith of the transactions and that the sale was for the full value of the property. If these

of the company to its president, upon a judgment which he had purchased against the corporation, the amount he actually paid. The court said: "At the time [appellant] purchased the judgment he was president of the company and acting for the company. The company's interest and his, in the transaction, were identical, and could not be separated. Whatever advantage he gained inured to its benefit. To permit the chief managing officer of a company in such a manner to speculate for his private gain would be detrimental to the company and the other stockholders, and would lead to fraud, injustice and wrong. Public policy and morality alike forbid that such a proceeding should be sanctioned. It is true that in ordinary cases no person would have a right to complain of the transaction but the company who suffered by the acts of its officer. But, in a case like this, the creditors whose rights are impaired should be permitted to make the objection." As to the incompetency of a director in a corporation to become the purchaser of a portion of its property, who has actively participated in all measures pending the completion of the arrangements for its sale, with full knowledge of all the circumstances attending their progress, see Hoffman Steam Coal Co. *v.* Cumberland Coal & Iron Co., 16 Md. 456.

[1] Crescent City Brewing Co. *v.* Flanner, (1892) 44 La. Ann. 22; s. c., 10 So. Rep. 384.

[2] Ibid.

[3] Tobin Canning Co. *v.* Fraser, (1891) 81 Tex. 407; s. c., 17 S. W. Rep. 25.

[4] Wilkinson *v.* Bauerle, (1887), 41 N. J. Eq. 635; s. c., 7 Atl. Rep. 514.

facts be not established the directors taking part in the sale will be held answerable to the creditors for their losses by the diversion of the corporate property.[1] Where a railroad company had become insolvent and discontinued its operations, and a director of the company had purchased certain railroad ties from the contractor furnishing them to the company, it was attempted to enforce an execution in favor of creditors of the corporation upon this property. ANDREWS, J., for the New York Court of Appeals, said: "Assuming that the plaintiff was disabled by the rule in equity from purchasing the ties on his own account or from holding them as against the company, nevertheless the legal title was vested in him by the purchase, and the property could not be taken from his possession under an execution against the corporation. * * * The purchase by a trustee of trust property is voidable, not void. The company could only claim the benefit of the purchase by the plaintiff on reimbursing the sum expended by him in obtaining the title."[2] A director, for instance, purchasing the lands of a corporation for one-tenth of their value, there would be raised against him a presumption of fraud, and he would be required to show affirmatively that the transaction was a perfectly fair one.[3] The Civil Code of California, section 2228, requires the highest good faith from a trustee towards his beneficiary, and section 2230 prohibits the trustee from taking part in any transaction adverse to the beneficiary. Under these sections the Supreme Court of that state has held a secretary of a corporation, at the same time its general manager, to whom all its affairs were intrusted, to have been guilty of a fraud upon the corporation in secretly purchasing its property in his own name when sold under execution or at tax sales.[4] A director may loan money to the corporation, take a mortgage to himself securing the loan, and upon foreclosure of the mortgage may purchase the property and obtain title to the property mortgaged.[5] A director

[1] Ibid.

[2] Cornell v. Clark, (1887) 104 N. Y. 451; s. c., 10 N. E. Rep. 888.

[3] Woodroof v. Howes, (1891), 88 Cal. 184; s. c., 26 Pac. Rep. 111.

[4] San Francisco Water Co. v. Pattee, (1890) 86 Cal. 623; s. c., 25 Pac. Rep. 135.

[5] Preston v. Loughran, (1890) 58 Hun, 210; s. c., 12 N. Y. Supp. 313. As to a purchase by a director of the property of a corporation at a foreclosure mortgage sale being valid, see Saltmarsh v. Spaulding, (1888) 147 Mass. 224; s. c., 17 N. E. Rep. 316.

of a corporation cannot, for instance, take possession of corporate property and set up his individual possession to the exclusion of the corporation of which he is an equitable trustee.[1] The directors of "a going concern," though the corporation be insolvent, will not be held liable, as for a breach of trust, for making a *bona fide* advantageous sale out and out of the corporate assets, all of which assets may have been attached, to one of the attaching creditors on condition that he would cancel his own debt and discharge the debts of other attaching creditors, especially where the directors have no means with which to control the attachment suits, and the transfer be advised by counsel.[2]

§ 194. **Illustrations of a sale of property to corporation which was not fraudulent.** — The corporation, upon the notes of which this action was brought in the federal court of the district of Kansas, in its answer denied the authority of the president and secretary of the company to execute or issue such notes, and further claimed that the notes were fraudulently and wrongfully issued through the collusion of the officers and directors of the company, and without any consideration whatever therefor. The facts were that two of the directors had, previously to the organization of the company, purchased a roadbed for a very small sum of money. They afterwards caused the defendant company to be organized, and, while in the relation of directors with others of the newly organized company, contracted with the other directors to sell the roadbed to the company for $200,000 cash or bonds and $3,600,000 of the capital stock. The sale was formally ratified at a meeting of the directors and entered on the records of the company; and afterwards the stockholders unanimously approved the purchase. At the time of the sale there were no stockholders, and the stock issued was all that had been subscribed. The company had no property except its charter and the roadbed, and the notes [which were issued instead of bonds] and stock issued to [the vendors] had no marketable value.

[1] Hoffman *v.* Reichert, (1889), 31 Ill. App. 558.

[2] White, Potter & Paige Mfg. Co. *v.* Henry B. Pettes Importing Co., (1887), 30 Fed. Rep. 864. That directors have no power to sell the entire movable property of a corporation used in its corporate business and disable the corporation from fulfilling the purposes for which it was created, see Abbot *v.* American Hard Rubber Co., 33 Barb. 578.

It was held that the sale was not fraudulent.[1] In a Kansas case it was attempted to make certain persons, directors of a railroad corporation, account for the profits made by them in selling to it a roadbed which they had purchased before the organization of the railroad corporation for a small sum for a much larger sum than they had paid. The Supreme Court ruled that the owners of

[1] Stewart *v.* St. Louis, Ft. S. & W. R. Co., (1887) 41 Fed. Rep. 736. FOSTER, J., discussed the actions of these directors in the premises as follows: "There is no doubt but the directors [the vendors], and perhaps [another director], while directors of the company, used their influence to consummate this sale from themselves as individuals to the company; and it is altogether probable they had that object in view when they bought the roadbed from [the vendor to them]. But the question still remains, were they guilty of fraud, deception or any other breach of good faith in their fiduciary relations as directors? At the time they bought the property the defendant company had not been organized, and at that time, of course, they could not have held any fiduciary relations to stockholders or any one else. When the sale to the company was made they did hold a position of trust, and were bound, in their official action, to faithfully and honestly execute their duties, and not to make a deal where their personal interest should be served at the expense of the company they represented. Wardell *v.* Railroad Co., 103 U. S. 651; Ryan *v.* Railroad Co., 21 Kans. 365; Koehler *v.* Iron Co., 2 Black, 715; 1 Moraw. Priv. Corp. § 517; Michaud *v.* Girod, 4 How. 513. But it does not follow that the directors are prohibited under all circumstances from dealing with a member or members of the board as individuals. But there must have been a fair open deal. It must have been free from fraud or collusion, and characterized by entire good faith." Hotel Co. *v.* Wade, 97 U. S. 13; 1 Mor. Priv. Corp. §§ 292, 521, 545; Van Cott *v.* Van Brunt, 82 N. Y. 535; Simons *v.* Oil Co., 61 Pa. St. 202; Oil Co. *v.* Densmore, 64 Pa. St. 43; Rice's Appeal, 79 Pa. St. 168; Parker *v.* Nickerson, 137 Mass. 487. The judge then discussed the particular facts of this case in these words: "It does not appear in this case that there was any deception or fraud practiced by the parties. The property was open to inspection, and the approximate cost of constructing it was easily obtainable. Its value to the company for the purpose desired was not difficult to ascertain. I find no evidence of any representations as to its value or cost, or purchase price, made by the parties selling; but there is record evidence that the board of directors several months after the sale, and with full knowledge of the transaction, formally approved and ratified it, and not only that, but subsequently, at a meeting of all the stockholders, the transaction was again ratified. Now, who were defrauded or deceived? All parties — directors and stockholders — assented to it, and surely subsequent purchasers of the stock, or the corporation itself, cannot now object to it. 1 Moraw. Priv. Corp. 290. It is true the vendors got a very large advance on the price they paid, but that is not alone the test by which the *bona fides* of the transaction is to be tried. 1 Moraw. Priv. Corp. 293. To them as individuals the property was of little or no value. To the railroad company it could be made worth the price paid

a graded roadbed could sell to a railroad corporation, the officers, directors and stockholders of which were composed of these owners, and receive in payment therefor shares in its capital stock at a time when those selling the roadbed owned and controlled the corporation, and are the absolute owners of all the stock issued by it, and where the terms of sale and the issue of the stock are matters of record on the corporation's books, and where the transaction occurs months before any other or additional stock is issued by the corporation.[1] This rule was based upon the fact that at the time of the purchase of this roadbed by the vendors of it to the corporation the corporation really had no corporate existence, and that there could not have existed any fiduciary relations between them before that time, because there was no corporation in existence to create them.[2]

§ 195. **When a transfer of property of corporation will be upheld.**— These facts are disclosed in a New York case. A manufacturing corporation was organized for the purpose of manufacturing carpets by machinery covered by certain letters patent, and issuing licenses for the use of the invention; its capital stock was $40,000, which was issued to the defendants, the owners of the letters patent, as the consideration for the assignment by them of the letters patent to the corporation. The actual value of the patent was much more than the sum specified, and the transfer was made without regard to its value, as a convenient mode of holding title, and for the exclusive benefit of the owners, who, as sole stockholders and trustees of the corporation. carried on the business of issuing licenses to use the inven-

for it; and the vendors bent every energy to make the property useful to the company, and to make the enterprise successful, for their chances of getting money or any other value for the property depended very largely on the result. As before remarked, parties having stock afterwards in the company cannot complain of the purchase. The records of the company show the transaction. It was not kept a secret. There was no compelling any person or municipality to take stock in the company unless they voluntarily chose to do so; and, if they were deceived by misrepresentations of the officers, their cause of action rests on that deception, and not in an attack on the original contract of purchase."

[1] St. Louis, Ft. Scott & Witchita R. R. Co. *v.* Tiernan, (1887) 37 Kans. 606; s. c., 15 Pac. Rep. 544.

[2] Ibid. There is a very full discussion of the questions relating to promoters of corporations, their rights, duties and liabilities, as viewed in English and American courts, in this case.

tion and collecting royalties. Subsequently, concluding to go into the business of manufacturing, the defendants, as trustees, transferred back to themselves the letters patent, they surrendering the stock issued to themselves as above stated. The stock of the corporation was increased to $600,000, all of which was issued to defendants, they paying first $250,000 in cash, and for the residue granting to the corporation a license to manufacture under the patent, on payment of a specified royalty. It was found by the trial court that this transaction was in good faith and with no intent to defraud any future holder of the stock, and that $350,000 of stocks was not an inadequate consideration for the license. Defendants thereafter assigned to plaintiff and another $100,000 of the stock, as the consideration of their assignment to the corporation of certain other letters patent. These assignees were informed of all the facts relating to the retransfer to defendants and the consideration for the issuing to them of the increased stock. Stock was also sold to another person who had knowledge of the facts. Plaintiff was elected a trustee. The corporation erected manufactories and carried on the business for a time, which resulted in a loss. Defendants and another, comprising a majority of the board of trustees, as such, adopted a resolution to sell the stock on hand, lease the manufactories, and to secure defendants for advances made by them by mortgage on the property of the corporation which was executed with the assent of two-thirds in interest of the stockholders. Defendants were the only creditors of the corporation, and the trial court found that the resolution above referred to was adopted in good faith, without intent to injure, and that it did not affect plaintiff, and was for the best interests of the corporation and its stockholders. The mortgage was thereafter foreclosed and the property bought in by one of the defendants. Plaintiff brought his action as trustee of the corporation to set aside the transfers of its property, which he alleged had been made or authorized by the defendant trustees as such to themselves individually, and for an accounting. The Court of Appeals of New York, upon the facts stated above, held that the complaint was properly dismissed.[1]

[1] Skinner *v.* Smith, (1892) 134 N. Y. 240, affirming 56 Hun, 437. The court said: "A contract entered into by a corporation by the authority or direction of its trustees, with themselves and for their benefit, or a transfer of its property by the authority of the trustees to themselves, may be set aside, in case it injures any public interest, or the private interest of any

§ 196. Officers voting themselves salaries or compensation.—The vote of a director for his own salary is manifestly illegal.[1] An agreement of directors to pay themselves a stipulated sum for services in the employment of a corporation is void.[2] The salary of the president of a corporation having been fixed by its directors, as they have a right to do, and accepting the office under their action, he cannot, by his vote as a director, increase his salary.[3] Where the superintendent of a corporation is also a director, his compensation must be fixed by corporate action, a record of which should be made upon the books of the corporation.[4] Should directors, who are not entitled to compensation for their services as directors by the provisions of the charter of the corporation or by its by-laws, or some custom or usage allowing such compensation, make such allowance to themselves for past services and issue bonds or orders for such allowances, their acts will be void and of no effect.[5] Salaries voted by its board of directors to one or more of their number, who are present and participating in the action, are not binding upon a corporation.[6] Where

shareholder or creditor, even though the contract or transfer was executed in good faith by the trustees. Duncomb *v.* N. Y., H. & N. R. R. Co., 84 N. Y. 190. But this rule is not broad enough to condemn as void on the ground of public policy all contracts and transfers executed by a purely private business corporation, with or to its trustees, in good faith, in case no public or private interest is harmed thereby. Such contracts are not void, but voidable, at the election of those who are affected by the fraud. Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587–589; Thomas *v.* Brownville, etc., R. R. Co., 109 U. S. 522–524; Risley *v.* Indianapolis, B. & W. R. R. Co., 62 N. Y. 240; Barnes *v.* Brown, 80 N. Y. 527–536; Munson *v.* S., G. & C. R. R. Co., 103 N. Y. 58–73; Barr *v.* N. Y., L. E. & W. R. R. Co., 125 N. Y. 263–277." The court, in the opinion in this case, concluded with this statement: "The right of a manufacturing corporation to discontinue its operations when they have become unprofitable, for the purpose of protecting shareholders from further loss, does not admit, we think, of doubt. Treadwell *v.* Salisbury Mfg. Co., 7 Gray, 395." Hancock *v.* Holbrook, 9 Fed. Rep. 353; Boston & P. R. R. Co. *v.* N. Y. & N. E. R. R. Co., 13 R. I. 263; Buford *v.* Keokuk L. Packet Co., 69 Mo. 611; Morawetz Corp., §§ 413 *et seq.* 1004.

[1] Davis Mill Co. *v.* Bennett, (1889) 39 Mo. App. 460.

[2] Guild *v.* Parker, 43 N. J. Law, 430.

[3] Ward *v.* Davidson, (1886) 89 Mo. 445.

[4] Besch *v.* West. Carriage Manufacturing Co., (1889) 36 Mo. App. 333.

[5] Maux Ferry Gravel Road Co. *v.* Branegan, (1872) 40 Ind. 361.

[6] Kelsey *v.* Sargent, (1886) 40 Hun, 150. In Copeland *v.* Johnson Manufacturing Co., (1888) 47 Hun, 235, the contracts made between one who was president and one of the trustees of the corporation, and two of the other four trustees of the corporation, for the payment to him of fixed com-

a board of directors had assigned to one of their number the performance of the duties of treasurer of the corporation, and no salary had been fixed for such office by the board, the Illinois Supreme Court assumed that the board chose to regard his services in that capacity as a part of his duty as director, and held that he could not recover an allowance made by them to him for such services.[1] The directors of a corporation occupying a fiduciary relation to it, should they vote themselves an excessive compensation for services in disposing of its stock, such an act would be an actual, not merely a constructive fraud.[2] In a case where the treasurer of a corporation had appropriated corporate funds to his own use as for a salary, and the court found the amount was excessive, the money was held to have been obtained by fraud and the treasurer liable for interest on the sum that he had thus appropriated.[3] In a case before the Supreme Court of New

pensation for the performance of services rendered by him for the corporation, being dependent for their validity upon his vote, together with that of the two directors, were held to be illegal. See, also, Coleman *v.* Second Avenue R. R. Co., 38 N. Y. 201.

[1] Holder *v.* LaFayette, Bloomington & Mississippi Ry. Co., (1873) 71 Ill. 106. It was said by the court: "[These directors] are managing a fund as trustees for the stockholders; and they have no right to use or apropriate the funds of their *cestuis que trust* to themselves. They have no power to waste, destroy, give away or misapply it, and when they were elected by the shareholders, no provision having been made for their compensation, the stockholders had a right to suppose they were acting under the common-law rule, that, as trustees, they could not claim payment for their services." See Kirkpatrick *v.* Penrose Ferry Bridge Co., 49 Pa. St. 121; Loan Association *v.* Stonemetz, 29 Pa. St. 534; New York & N. H. R. R. Co. *v.* Ketchum, 27 Conn. 170; Henry *v.* Rutland & B. R. R. Co., 27 Vt. 435; Butts *v.* Wood, 37 N. Y. 317; Merrick *v.* Peru Coal Co., 61 Ill. 472; Rockford, Rock Island & St. Louis R. R. Co. *v.* Sage, 65 Ill. 328; Cheeney *v.* LaFayette, Bloomington & Western Ry. Co., 68 Ill. 570; American Central R. R. Co. *v.* Miles, 52 Ill. 174; Gridley *v.* LaFayette, B. & M. Ry. Co., 71 Ill. 200; LaFayette, B. & M. Ry. Co. *v* Cheeney, 87 Ill. 446; Illinois Linen Co. *v.* Hough, 91 Ill. 63.

[2] Freeman *v.* Stine, (Pa.) 38 Leg. Int. 268; Fareira *v.* Riter, (Pa.) 38 Leg. Int. 450.

[3] Wayne Pike Co. *v.* Hammons, (1891) 129 Ind. 368; s. c., 27 N. E. Rep. 487. In Emporium Real Estate & Manufacturing Co. *v.* Emrie, (1870) 54 Ill. 345, it was held that the president of the corporation, who, claiming that the corporation was indebted to him for his salary as president and for services as attorney at law, had caused the secretary of the corporation to assign to him certain certificates of purchase of land held by the corporation, and in their possession as officers, should surrender these certificates to the corporation. It was said

York these facts were shown: That the corporation had been managed by the owners of the stock in harmony and at a small salary until the president of the corporation wanted a part of the plaintiff's stock; to compel the sale a threat was made to raise the salaries of the officers. A subsequent raise of the salaries followed. Again there was the same refusal to sell, another similar threat, and this was followed by an extremely large increase, and this was followed by a threat that there must be another increase accompanied by an averment that there was no limit to the raise except the will of the trustees. The court held that the action of the trustees in the matter of raising the salaries of its officers was a spoliation of the corporation for an unworthy purpose, and trustees would not be permitted to act in such a manner with the corporation's funds.[1] A majority of the directors, there being three, and all stockholders of a corporation, having combined, so managed the business of the corporation as to divert all the profits of the enterprise from their legitimate destination, and to appropriate them to their own use, as by voting to themselves extraordinary salaries, the chancellor held that as they had in part executed their plan, and the circumstances rendered any change in the *personnel* of the management impracticable, a proper case had arisen for the intervention of the court to make a division of the assets. He also held that such a

by the court: "The claim of the president had not been allowed by the board of directors or by a committee appointed by them. In effect, the president audited his own demand, and then seized upon property for its payment. This can never be permitted to the officers of corporations. The toleration of such practice would be destructive of the rights of creditors and of stockholders. The assets would be at the mercy of the officers, who have no legal or equitable rights to control them, except for the benefit of the company." In Ashley *v.* Kinnan, (Sup. Court, Spl. Term, 1888) 2 N. Y. Supp. 574, it was held that the amount received by an officer presiding over the board of trustees, when the board voted him a salary for certain services, and it not appearing that he dissented to this action, could be recovered of him by the receiver of the corporation on the general ground of equity controlling the actions of directors or officers of a corporation as holding a fiduciary position in connection with voting or granting anything to their personal advantage. As to the action of three of five directors of a corporation in voting a salary to one of the three as secretary being void, see Martin *v.* Santa Cruz Water Storage Co., (Ariz. 1894) 36 Pac. Rep. 36.

[1] Ziegler *v.* Hoagland, (1889) 52 Hun, 385; s. c., 5 N. Y. Supp. 305, affirming the judgment restraining such conduct on the part of the trustees, citing to the point Butts *v.* Wood, 37 N. Y. 317; Ogden *v.* Murray, 39 N. Y. 202.

trustee, having committed a breach of trust by deliberately extracting and appropriating to his own use a portion of the trust fund, could not cure the breach and demand the further custody of the fund by simply restoring it.[1]

§ 197. Interest upon exorbitant salary voted officer recoverable.— There was a contention in an Indiana case that the damages assessed by the court were too large. It was based upon the fact that the court allowed interest on the amount, or a portion of the amount, appropriated or used by the appellants. The argument was that the money received by the treasurer belonged to him and that he had the right to use it so long as he furnished the amount due when called upon to do so. The Supreme Court said of this: "The argument is based upon false premises. The treasurer of a private corporation does not bear that relation to the funds which come into his hands sustained by a public officer. A public officer, when called upon to account for moneys which come into his hands, as such, cannot excuse himself on the ground that the funds have been stolen, or destroyed without his fault, because, by legal fiction, the money is supposed to belong to him, and he must bear the loss. Such fiction is thought to be necessary for the safety of the public funds. But it is not so with the treasurer, or agent, of a private corporation. If the funds in his hands are lost, or destroyed, without his fault, the loss is the loss of the principal and not the loss of the treasurer or agent. Mowbray *v.* Antrim, 123 Ind. 24. A large portion of funds involved in this suit was allowed to the secretary and treasurer, as salary, and presumably he used the sum so allowed him. The court found that such salary was exorbitant and unreasonable and required the appellants to account for all the funds used in that way over and above a reasonable compensation for the services of the secretary and treasurer. If these funds were so used, we know of no good reason why those who used them should not account for the interest. We do not think the court erred in charging the appellants with interest on the funds which came into their hands, and which were used by the secretary and treasurer in his private business, under the guise of an exorbitant salary."[2]

[1] Fougeray *v.* Cord, (1892) 50 N. J. Eq. 185; s. c., 24 Atl. Rep. 499.

[2] Wayne Pike Company *v.* Hammons, (1891) 129 Ind. 366, 378, 379.

§ 198. Contracts between corporations having the same directors in part.— Where the managers of a railroad corporation, acting in its interests, buy a controlling interest in the stock of a connecting railroad for the purpose of making with themselves as controlling managers of the connecting road contracts more favorable to the former, and accomplish their purpose, the question whether the contracts are fair and just is immaterial in a stockholder's injunction suit to restrain the execution of the contracts.[1] A construction company contracted with a railway

[1] Pearson *v.* Concord Railroad Corporation, (1883) 62 N. H. 537. It was said by the court, in the opinion: "A director of a railroad corporation, though not technically a trustee, stands in a fiduciary relation to the corporation, and is under the disability of a trustee. Practically, the directors are trustees, and the stockholders are the *cestuis que trust.* Like all other persons where this relation exists, he cannot, as buyer for his corporation, buy of himself against the objection of his *cestui que trust*, nor as seller for the corporation become the purchaser, nor, being its agent and trustee, contract with himself or secure to himself advantages not common to other stockholders, because such contracts and relations are likely to bring him in conflict with his duty and self-interest, and tempt him to be unfaithful to the superior obligations he has assumed. [Citing] Pierce on Railroads, 36; Moraw. on Corp., § 215; Ang. & Ames on Corp. § 233, note *a*, § 312; Butts *v.* Wood, 37 N. Y. 317; Hoyle *v.* Railroad, 54 N. Y. 315, 328; Blake *v.* Railroad, 56 N. Y. 485, 490; Barnes *v.* Brown, 80 N. Y. 527, 535; Duncomb *v.* Railroad, 84 N. Y. 190, 198; Robinson *v.* Smith, 3 Paige, 222, 232; Koehler *v.* Iron Company, 2 Black, 715, 721; Bliss *v.* Matteson, 45 N. Y. 22; 1 Per. Tr. § 207; Booth *v.* Robinson, 55 Md. 419, 436, 440. * * * In England parliament has declared by statute (8 & 9 Vict. chap. 16) that no person interested in any contract with a corporation shall be capable of being a director thereof, and if any director shall directly or indirectly be concerned in any contract with the corporation, his office shall become vacant. The office becomes vacant, although in a suit at law between the parties upon such a contract the contract is not held void. Foster *v.* Railway Co., 13 C. B. 200. Such contracts are voidable in equity at the suit of a stockholder. We have no such statute; but reason and common sense, and all the analogies of the law, forbid that a person should act in a position of trust when self-interest conflicts with duty. The consciences of men in such positions will not stand the strain of self-interest. We approve the remarks of Welch, J., in Goodin *v.* Canal Co., 18 Ohio St. 169: 'A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders as well as himself have personal interests in conflict with those of the company. He does not represent them as persons, or represent their personal interest. He represents them as stockholders, and their interests as such.' Rolling Stock Co. *v.* Railroad, 34 Ohio St. 465, was a stockholders' bill for an injunction. The plaintiff's board of five directors

corporation for the construction of a portion of its road, the payment to be made in the mortgage bonds of the latter. Two of the directors of the railway corporation were also parties in the construction contract. The other parties in the construction contract agreed to assume the subscriptions of all the individual directors of the railway corporation to the capital stock of that

were members of the defendant's board of thirteen. The bill was dismissed because not seasonably brought; and the remarks of the court, to the effect that the agreements ought to be set aside was valid because executed by a majority of the board without the interested directors, would seem to be *dicta*. Ashhurst's Appeal, 60 Pa. St. 291, and Watts' Appeal, 78 Pa. St. 370. are sometimes cited to the point that contracts or sales, made by a board of directors with or to some of their number, may be sustained in equity, and the remarks of the court are to the point that such contracts and sales may be upheld if their perfect fairness is shown. These cases were stockholders' bills to set aside sales of property, upon the ground of a violation of fiduciary duty. Relief was denied upon the ground that the applications came too late. Flagg *v.* Railway Co, 20 Blatch. 142; s. c., 21 Am. Law Reg. 775, decides that where an agreement is made by the directors relinquishing the right to a guaranty of dividends to a corporation by another corporation, the execution of the agreement will not be enjoined at the suit of a stockholder, because three of the directors voting were also stockholders in the guarantor corporation, it appearing that, without counting their votes, a majority of the directors voted for the measure. In Butts *v.* Wood, 38 Barb. 181; s. c., [on appeal] 37 N. Y. 317, the action of the majority of two in a board of three, passing upon the claim of a third director, who also voted, was set aside at the instance of one of the stockholders. See, also, Wardens of St. James *v.* Rector, etc., Church of the Redeemer, 45 Barb. 356; Kitchen *v.* Railroad, 69 Mo. 224; Railroad *v.* Kelly, 77 Ill. 426; Koehler *v.* Black, etc., Iron Co., 2 Black, 720; Moraw. on Corp. 245, and cases; 1 Perry on Tr. § 207, and cases; Pierce on Railroads, 36–40, and cases; Green Brice Ultra Vir. 477, note (a) and cases. Stockholders and creditors are entitled not only to the vote of a director in the board but to his influence and argument in discussion. Ogden *v.* Murray, 39 N. Y. 202, 207; Railway Co. *v.* Blakie, 1 Macq. (H. L. Cas.) 461, where the court said: 'It was Mr. Blakie's duty to give his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject.' In Barnes *v.* Brown, 80 N. Y. 527, 536, the court said: 'If he [plaintiff] had attempted to perform the contract while he was director, the stockholders could probably have intervened by some suit in equity adapted to the nature of the case to nullify the contract as to him, or to restrain him as to the performance thereof, or to compel him to elect to resign his office of director, or to give up the contract.' Our conclusion upon this part of the case is, that the directors of the Concord could not make the contracts with the upper companies, nor settle the claims of those companies against the Concord. For the transaction of that part of the business of their office they were disabled by the understanding on which, the purpose for which, and the interest in and by which, they were elected."

corporation (which was worthless) and relieve the directors from all liability under it. This contract the Supreme Court of the United States held not to be enforceable in equity when resisted by stockholders in the railway corporation; and the bonds issued under it to the construction company were held to be voidable at the election of the parties affected by the fraud, while in the hands of parties who took them from the construction company, not in the ordinary course of business, but under circumstances which threw doubt upon their being holders for value or without notice.[1] The stockholders had been allowed to come into the suit for foreclosure of the mortgage and filed their cross-bill. The court said: "In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these intervenors to defeat the mortgage on any other ground would be unjust, and would make the court the instrument of this injustice."[2] In a leading Missouri case, where a railroad corporation was not in financial condition to complete its road in all its branches, which was essential to its proving profitable, an association of capitalists was formed, the object of which, as expressed in its articles, was the purchase of the bonds of the corporation, and ultimately, if found profitable to do so, the purchase of the road itself, provided the association could obtain control of the company. The bonds of the corporation were subsequently purchased of it, and the association allowed to name a majority of the directors. It was insisted that this transaction was fraudulent by reason of the

[1] Thomas, Trustee, *v.* Brownville, Fort Kearney & Pacific R. R. Co., (1883) 109 U. S. 522; s. c., 3 Sup. Ct. Rep. 315. The court said: "In the present case the stockholders of the corporation, whose officers accepted those benefits at the hands of the parties with whom they were, in the name of the corporation, making a contract for over a million of dollars, do denounce and repudiate that contract. The conduct of these directors is utterly indefensible." Referring to Wardell *v.* Union Pacific R. R. Co., 103 U. S. 651, and same case in 4 Dill. 330, as in precise analogy to this.

[2] Thomas, Trustee, *v.* Brownville, Fort Kearney & Pacific R. R. Co., (1883) 109 U. S. 522; s. c., 3 Sup. Ct. Rep. 315. As to the effect of a railway corporation and a construction company having mainly the same officers, see Davidson *v.* Mexican National R. Co., 58 Fed. Rep. 653.

control of the corporation being surrendered to the association, and because the latter looked to the ultimate acquisition of the road. These facts were held not to establish fraud.[1] It was also insisted in this case that the transaction was fraudulent because, at the time of its consummation, three of the thirteen directors of the railroad corporation were members of the association purchasing. The court held that this, if a fact, would not make the sale void.[2] The fact that shortly after the contract for purchase of bonds, etc., was proposed to the railroad corporation, and before its acceptance, several of the directors became members of the association was held to render the contract, when made, voidable only, and not absolutely void.[3] It was further held in this

[1] Kitchen *v.* St. Louis, Kansas City & Northern Ry. Co., (1878) 69 Mo. 224. The court said: "There is nothing inconsistent with the utmost good faith in either of these stipulations [as to purchase of the road or securing control of it]. The last might well have been insisted on because the purchase of the bonds, if made, involved and would require millions of money, and the only security which could be relied upon to save harmless those who furnished it, would be a faithful and honest application of it to the completion and equipment of the road. Hence, there was a propriety in the demand of these capitalists that they should have a controlling voice in the directory in order that the money furnished might be thus applied and result in giving them ample security for their investment in the bonds. So, in regard to the first stipulation, 'to buy the road ultimately, if deemed profitable to do so,' it may be said that there was nothing illegal or fraudulent in that alone, as we cannot presume and infer from it, that if they should purchase they would purchase it in any other than a lawful manner and under circumstances which would authorize them to buy."

[2] Kitchen *v.* St. Louis, Kansas City & Northern Ry. Co., (1878) 69 Mo. 224; citing, as authority, Buell *v.* Buckingham, 16 Iowa, 284; Hartridge *v.* Rockwell, R. M. Charlton's Rep. 260; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587.

[3] Kitchen *v.* St. Louis, Kansas City & Northern Ry. Co., (1878) 69 Mo. 224. The court said, *arguendo,* leading up to the conclusion stated in the text: "Viewing the transaction as one under which the Missouri Railroad Company was to receive sufficient money to complete the road, as therein stipulated, and pay the interest on the first mortgage bonds and save the road from sale, we have the highest authority for saying that it was not void, as is contended by plaintiffs. In the case of the Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 588, which is a recently and thoroughly considered case, the court, after recognizing to the fullest extent that a director of a corporation occupying a fiduciary relation in his dealings with the subject-matter of his trust or agency, and with the beneficiary whose property is confided to his care, is viewed with jealousy, and that his acts may be set aside on slight grounds, declares 'that the general doctrine in regard to contracts of this class is not that they are absolutely void, but that they are voidable on the election of the party whose interest

case that the stockholders in meeting, having had this proposition made to them for the purchase of the bonds and obtaining control of the road, etc., submitted to them and making no objections, it was too late, after the lapse of five years, for them to impeach the transaction.[1] The mere fact that the president of a railroad company, unknown to the other directors, is interested in a construction contract let by the company would not make the contract void if it be otherwise free from fraud.[2]

§ 199. **Issue of worthless, or overissue of, stock.**— Directors issuing spurious, worthless stock would perpetrate a wrong upon the corporation and its stockholders, and a fraud upon every one who might take it as fully paid-up stock, relying upon the appearances and deceived thereby.[3] In case an attempted organization by failure to comply with the statute for organizing corporations of its kind does not become a corporation *de jure*, and cannot legally issue stock, the issue of stock by it will not alone make the directors liable for a fraudulent conspiracy to issue worthless stock.[4] Neither can an intent to deceive on the part of the directors be inferred from such issue of worthless stock, and the fact that the nominal is largely in excess of the actual capital.[5] One who had purchased shares of stock of a corporation, the managing officers of which, president, vice-president and director and treasurer, had made an overissue of stock for a large amount

has been so represented by the party claiming under it. While it is true that a director of a corporation is bound by all those rules of conscientious fairness which courts of equity have imposed as guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed and the transaction is open and otherwise free from blame. * * * No adjudged case has gone so far as this. Such a doctrine, while it would afford but little protection to the corporation against actual fraud, would deprive it of the aid of those most interested in giving aid and best qualified to judge of the necessity of that aid and the extent to which it might be given.' The same doctrine was, in the strongest terms, announced in Judge RYLAND's opinion in the case of The City & County of St. Louis *v.* Alexander, 23 Mo. 528, and the authorities cited, upon which the opinion is based."

[1] Kitchen *v.* St. Louis, Kansas City & Northern Ry. Co., (1878) 69 Mo. 224.

[2] Augusta, Tallahassee & Gulf R. Co. *v.* Kittel, (1892) 52 Fed. Rep. 63.

[3] Barnes *v.* Brown, (1880) 80 N. Y. 527, 534; citing Mechanics' Bank *v.* New York & New Haven R. R. Co., 13 N. Y. 599; Bruff *v.* Mali, 36 N. Y. 200; Morgan *v.* Skiddy, 62 N. Y. 319; Shotwell *v.* Mali, 38 Barb. 445.

[4] Nelson *v.* Luling, (1875) 62 N. Y. 645.

[5] Ibid.

and converted the proceeds to their own use, was held to have stated a good cause of action in his complaint against those officers in alleging the above facts, and the further allegation that by the overissue of stock the genuine stock, including that held by himself, was rendered valueless and became unsalable.[1] Officers of a corporation issuing false certificates of stock authenticated by them as genuine and placed by them on the market with fraudulent intent, are liable to every holder into whose hands they may come by fair purchase.[2] In a Vermont case, where the treasurer of the corporation had fraudulently overissued stock of the corporation and sold the same for money, it was held that the corporation might recover in general assumpsit from him the money he had received for such stock, where the spurious stock had become so intermingled with the genuine as to be indistinguishable and the corporation had been compelled to and had treated it as genuine.[3] Further, that, although the stock, when issued, may have been absolutely void, and the issuing of it by the treasurer a crime, the treasurer could not allege the illegality of his act as a reason why he should not pay over the money.[4]

[1] Cazeaux *v.* Mali, (1857) 25 Barb. 578; s. c., as Mead *v.* Mali, 15 How. Pr. 347. See, also, Wells *v.* Jewett, 11 How. Pr. 242; Bell *v.* Mali, 11 How. Pr. 254.

[2] Bruff *v.* Mali, (1867) 36 N. Y. 200; Seiser *v.* Mali, 6 Abb. Pr. 270, *note;* Shotwell *v.* Mali, 38 Barb. 445. For a case illustrating under what circumstances the purchasers of stock endangered thereby would not have a remedy in equity against the fraudulently acting directors, see Morrison *v.* Globe Panorama Co., 28 Fed. Rep. 817. Fraudulent issue of stock: Clark *v.* American Coal Co., (Iowa, 1894) 53 N. W. Rep. 291; Citizens' Nat. Bank of Cincinnati *v.* Cincinnati, N. O. & T. R. Ry. Co., 29 Wkly. Law Bull. 15; Brown *v.* Duluth, M. & N. Ry. Co., 53 Fed. Rep. 889; Florida Land & Imp. Co. *v.* Merrill, 52 Fed. Rep. 77; s. c., 2 C. C. A. 629.

[3] Rutland Railroad Co. *v.* Haven, (1889) 62 Vt. 39; s. c., 19 Atl. Rep. 769.

[4] Ibid. In Wright's Appeal, (1882) 99 Pa. St. 425, the president of a railway corporation, it appeared, induced a stockholder in the corporation to surrender to him her shares of stock, together with blank powers of attorney to transfer the same, by means of false representations that they were needed to aid the corporation. He gave to her his individual due bill, transferred the stock and embezzled the proceeds. Subsequently, by combination with other officers, he fraudulently issued stock in excess of the charter limit, and of this overissue of stock he awarded to the use from whence he had secured the shares which he transferred a number of shares equal to the number of her voted shares. In an equity proceeding by her to determine her rights and the corporation's growing out of this transaction, the Supreme Court of Pennsylvania held that she must bear the loss resulting from the embezzlement by the president of the funds re-

§ 200. False representations of officers — deceit.— The directors of a corporation are personally liable to persons who may sustain loss in consequence of false representations made by the directors to them or to the public at large, such representations being fraudulently and designedly made, or ignorantly made, concerning facts susceptible of knowledge, and of which it is the official duty of the directors to obtain correct information.[1] A stockholder in this Texas case had been induced by the representations of these directors to deposit money with the company, which was then insolvent, and these directors had accepted the deposits and applied them to the payment of a debt for which they were sureties. The court held that the directors were estopped in this action to charge them personally to set up as a defense their want of authority to receive the deposits.[2] It was further held that the fact that the plaintiff was a stockholder and had access to the books of the concern, and the means of knowing its true condition would not, of itself, prevent a recovery against the directors.[3] Persons representing to the public that a corporation had been regularly organized, in circulars signed by them as regularly elected officers, and prematurely issuing stock certificates, one purchasing such certificates will be entitled to recover damages for his injury, the result of such purchase, irrespective of any intent on their part to defraud him in particular.[4] In an action against the directors of an insurance

sulting from a sale of her valid shares, and that the shares he issued to her in excess of the charter limit were invalid and valueless. The ground was that, under the facts of the case, the president was acting as her agent and not as agent for the corporation. For another case involving the fraudulent issue of stock by this president of this railroad corporation, see Mount Holly Paper Co.'s Appeal, (1882) 12 W. N. C. (Pa.) 228.

[1] Kinkler *v.* Junica, (1892) 84 Tex. 116; s. c., 19 S. W. Rep. 359, adhering to Seale *v.* Baker, 70 Tex. 286; s. c., 7 S. W. Rep. 742.

[2] Kinkler *v.* Junica, (1892) 84 Tex. 116; s. c., 19 S. W. Rep. 359.

[3] Ibid. The court said: "A stockholder in a corporation has as much right to protection against the fraudulent acts of the trustees or directors as any one else, if, indeed, he has not more right, although on account of his access to the books, he may be held to greater care in his dealings with the corporation." As to what would be proper instructions to the jury in an action of deceit to charge a president of a corporation with the debt of the corporation by reason of his representations to a creditor as to the solvency of the corporation, see King *v.* Davis, (1891) 61 Hun, 627; s. c., 16 N. Y. Supp. 427.

[4] Fenn *v.* Curtis, (1881) 23 Hun, 384.

corporation for damages incurred by one who had been induced by a statement made by its officers as to its assets, to insure his property, and had met with a loss, which, by reason of the utter insolvency of the corporation, he was unable to make good out of the corporation, based upon the misfeasance of the directors in fraudulently permitting such statement to be made, one of the defendants denied his participation in the fraud, and all knowledge that certain bonds belonging to him were represented in the official published statement as property of the company. The Supreme Court of Connecticut held that evidence was admissible on the part of the plaintiff to show that the president and another director of the corporation had, shortly before the publication of the statement, solicited the director denying his liability to make some arrangement by which the bonds could be represented to be the property of the corporation; also, that a receipt given by him to the corporation, acknowledging that the bonds were the property of the corporation, and were held by him subject to its order, was admissible; further, that his acts after the plaintiff had taken his policy, not in themselves independent, but connected with and growing out of the previous fraudulent purpose, were admissible to show his knowledge of, and participation in, the fraud.[1] The United States Supreme Court affirmed the sustaining of a demurrer to a bill filed by bondholders against the president of a railroad corporation and others, to make him liable to them on allegations of fraudulent representations on his part as to the length of the road, a mortgage on which was to be a part of the security for the payment of the bonds, and for fraudulently allowing a misapplication of the moneys realized upon the sale of the bonds to them, etc. They held that the allegation in the bill that the president received money from the sale of the bonds, but not averring that the bondholders had obtained judgment against the corporation upon their bonds, and that execution issued on the judgment against the corporation had been returned *nulla bona*, showed nothing entitling the bondholders to relief in equity as a creditor of the corporation; further, that the president of such a corporation held no fiduciary relation to the bondholders of the corporation which required him, as their trustee or agent, to see to the

[1] Salmon *v.* Richardson, (1862) 30 Conn. 360.

proper application of the moneys received by the corporation from the sale of the bonds, or to account to the bondholders for any surplus from the proceeds of their bonds after constructing the works for which they were issued; that his fiduciary relations and duties in these respects were to the corporation and its stockholders, and not to the creditors of the corporation; that the representations made in the circular issued under his name were the representations of the corporation, and in no respect his personal representations.[1] The president of a manufacturing corporation writing to induce one to purchase, and pay in cash for it $10,000, value of its stock at par, offered a position for her son, and represented to her by letter that the corporation was in a flourishing condition, and that there had been paid a dividend of seven per cent upon the stock, as she reasonably understood the letter, nine months before, when in fact it was paid one year before that date. This was three months before the close of a fiscal year, and when that period of time was reached, she expected a dividend, but was informed that the condition of the corporation was such that the managers had deemed it best to withhold declaring a dividend. This president, it afterwards, in her action by bill in equity, developed, had sold certain recipes and good will, etc., for manufacturing the articles which they manufactured, which were utterly worthless, and for which he had been paid largely out of the money she paid in for stock purchased under the inducements he had held out to her, and upon his representations. Her bill was filed against the corporation and the president for recovery, account, etc., to have the assets of the corporation, in so far as they would be available to her claim, for the amount of money she had, in the mode proposed to her, contributed to the corporation, and for general relief for the deficiency against the president on account of his fraudulent representations and wrongdoings in the management of the corporation's finances in his own interest by which she was damaged. It was contended, before the Supreme Court of the United States, that the court had no jurisdiction in equity, as against him. The court sustained its jurisdiction on the various grounds of equity as shown in the allegations of the bill, and the findings as to the facts, and affirmed the decree in her favor for the deficiency against the president of the corporation individu-

[1] Van Weel v. Winston, (1885) 115 U. S. 228; s. c., 6 Sup. Ct. Rep. 22.

ally.[1] An officer of a corporation making false statements with reference to the financial status of the corporation, and thereby inducing an exchange of property by another, for such stock, would be liable to the latter in a personal action for the damages caused to him by the transaction.[2] This would be true even if the false statement be made by the officers in a statement as to the resources and liabilities of the corporation, required by statute, if such statement is relied upon in purchasing the stock.[3] Where several persons engage in business jointly, and, to facilitate such business, use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business, as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business, as associates of those making the false representations, are liable to those who, relying upon such representations, purchase stock to their cost and injury.[4]

[1] Tyler *v.* Savage, (1892) 143 U. S. 79; s. c., 12 Sup. Ct. Rep. 340. Mr. Justice BLATCHFORD, referring especially to the statement as to the prior declaration of a dividend, in his letter to complainant, said: "This suppression of a material fact [the date when the dividend was actually declared] which Tyler [the president] was bound in good faith to disclose, was equivalent to a false representation. Stewart *v.* Wyoming Ranche Co., 128 U. S. 383, 388. The effect of the fraud committed by Tyler inured directly to his personal advantage. Not only was he, as a large stockholder and salaried officer, benefited by the plaintiff's payment into the treasury of the company of the $10,000, but, as already shown, $6,200 of that sum went directly to his benefit, and the remainder, he testifies, went to the purchase of material and ordinary expenses of the company. The latter amount enabled the company to continue paying to Tyler his salary for some time longer."

[2] Newbery *v.* Garland, (1860) 31 Barb. 121. See, also, Bagshaw *v.* Seymour, 4 C. B. (N. S.) 873.

[3] Morse *v.* Swits, 19 How. Pr. 275.

[4] Hornblower *v.* Crandall, (1879) 7 Mo. App. 220; affirmed in Hornblower *v.* Crandall, (1883) 78 Mo. 581. It was said in Hornblower *v.* Crandall, 7 Mo. App. 220, 232: "The doctrine by which the defendants are here made liable is a well-settled doctrine. Persons investing in stock, under circumstances like the present, have a right to confide in those who hold themselves out as the promoters and managers of a business which they are carrying on, so far as concerns representations made by such promoters, or under their authority, as to material facts of inducement peculiarly within the knowledge of the associates or their agents." Citing Cross *v.* Sackett, 2 Bosw. 617; Cazeaux *v.* Mali, 25 Barb. 583; Simons *v.* Vulcan, etc., Co., 61 Pa. St. 202; Morgan *v.* Skiddy, 62 N. Y. 319; Miller *v.* Barber, 66 N. Y. 558; Bradley *v.* Poole, 98 Mass. 169; New, etc., Co. *v.* Erlanger, 4 Cent. L. J. 510.

§ 201. A leading English decision on this subject.— In a comparatively late English case, an action of deceit brought by a shareholder against the directors of a tramway company, based upon statements in a prospectus which they issued, which induced him to purchase his shares, it appeared that the company was incorporated with the right to move their carriages by animal power, and, with the consent of the board of trade of the city, by steam power. It was stated in the prospectus that the company had the right to use steam power instead of horses. On the faith of this statement the plaintiff purchased his shares. The board of trade afterwards refused their consent to the use of steam power and the company was wound up. The justice before whom the action was first tried gave a decision upon the case made before him in favor of the directors. This decision was reversed by the Court of Appeal.[1] Upon appeal to the House of Lords, the Court of Appeal's decision was reversed and the trial justice's decision restored. The decision of the House of Lords was that the directors were not liable, inasmuch as their statement in the prospectus as to the use of steam power was made by them in the honest belief that it was true. The main opinion in the case was by Lord Herschell, whose discussion, treatment of and conclusions from all the leading English cases upon actions of deceit were accepted by the others in their opinions. These conclusions were thus summarized and stated by Lord Herschell: "*First.* In order to sustain an action of deceit there must be proof of fraud and nothing short of that will suffice. *Secondly.* Fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth, or recklessly careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. *Thirdly.* If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. * * * In my opinion, mak-

[1] See Peek *v.* Derry, 37 Ch. Div. 541.

ing a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. * * * I am unable to hold that anything less than fraud will render directors or any other persons liable in an action of deceit." [1]

§ 202. **The rule adhered to in England.**— In a later English case it appeared that one who was the principal partner in a trading firm concurred in steps for turning the partnership into a company with limited liability. His name appeared on the prospectus as managing director of the new company, with a note that he would not join the board till after the transfer of the

[1] Derry *v.* Peek, (1889), 14 App. Cas. 337. Lord HERSCHELL took occasion to say further: "At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord BLACKBURN in Brownlie v. Campbell, (5 App. Cas. at page 952), a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false. I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances are true should be made an actionable wrong. But this is not a matter for fit discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud and equally holding a man fraudulent whether his acts can or cannot be justly so designated."

business of the company had been completed. He did not issue the prospectus, but furnished materials for it; saw it in draft, though not in its final shape, and made alterations in it. It was held by the Court of Appeal that, under the circumstances, he was liable to the same extent as if he had been the person issuing the prospectus. The prospectus contained a statement that the business had paid seventeen per cent upon the capital employed in it. This statement, it appeared, might be true if "capital employed" did not include the business premises, or only included their value subject to mortgages upon them, but was grossly untrue if the whole value of the business premises was taken as part of the capital. This action was brought by one who had taken shares on the faith of the prospectus for damages for misrepresentations. The Court of Appeal held that, in order to make a person liable for damages for misrepresentation, it was not enough that the statement should be untrue, and made without any reasonable ground for believing it to be true, but it must be made dishonestly; that the onus of proving dishonesty lay on the plaintiff; that if the party making the statement believed, however unreasonably, that it was true, he was not liable. And as the plaintiff in this case had not shown that the statement was made dishonestly, the Court of Appeal reversed the judgment and dismissed the action.[1]

§ 203. **Officers conspiring to wreck a corporation.**—The power given to a president of a corporation to borrow money will not embrace the power to buy stock in the corporation, or

[1] Glasier *v.* Rolls, (1889) 42 Ch. Div. 436, following Derry *v.* Peek, 14 App. Cas. 337. As to the liability of corporation and officers making them for damages resulting to individuals from false statements of such officers in prospectuses or otherwise, see Moffat *v.* Winslow, 7 Paige, 124; National Exchange Co. *v.* Drew, 32 Eng. Law & Eq. Rep. 1, 14; Pontife *v.* Bignold, 3 Man. & Gr. 63; Bagshaw *v.* Seymour, 93 Eng. Com. Law Rep. 873; Johnson *v.* Goslett, 3 C. B. (N. S.) 569; Colt *v.* Woolaston, 2 P. Wms. 154; Green *v.* Barrett, 1 Sim. 45; Jones *v.* Garcia Del Rio, 1 Tur. & Russ. 297; Blain *v.* Agar, 1 Sim. 37; Gerhard *v.* Baley, 20 Eng. Law & Eq. Rep. 130; Colman *v.* Riches, 29 Eng. Law & Eq. Rep. 323; Hichens *v.* Congreve, 4 Russ. 562; Walburn *v.* Ingilby, 1 Mylne & K. 61; Foss *v.* Harbottle, 2 Hare, 461; Pasley *v.* Freeman, 3 Term Rep. 51; Shrewsbury *v.* Blount, 2 Scott's N. R. 588; Gallager *v.* Brunel, 6 Cowen, 346; Allen *v.* Addington, 7 Wend. 9; Bailey *v.* Mayor, etc., 3 Hill, 531; City of Buffalo *v.* Holloway, 3 Seld. 493; Culver *v.* Avery, 7 Wend. 384; Upton *v.* Vail, 6 Johns. 181; Barney *v.* Dewey, 13 Johns. 224; Williams *v.* Wood, 14 Wend. 126.

other corporate stocks or such articles as the corporation may need in its business. Upon this construction of such a power given to a president of a corporation in an Illinois case where it appeared that the president of a private corporation, who held a controlling share of the stock, was given the power to borrow money, sold, as the agent of his wife, her stock to the company, and gave her judgment notes payable on demand, for such stock, upon which notes judgment was confessed in favor of the wife, under which judgment all the corporate property was sold, and the proof showed that the president, in the transaction, was seeking to break down the corporation, and transfer its property fraudulently to his wife, and there being proof of a conspiracy on the part of the president and secretary to wreck the corporation, the Supreme Court held that the sales of the corporate property under the judgments conferred were properly set aside on the bill of stockholders and creditors filed for that purpose.[1]

§ 204. President conspiring against corporation — terms on which the corporation could rescind the contract made by him.— A corporation sought to recover from defendant the money which had, as alleged, been paid out of its funds by its president, in carrying out a conspiracy between defendant, a holder of its stock, for such stock at par value when it was only worth seventy-five per cent of its par value, and the corporation itself was offering unsubscribed shares of its capital stock at eighty per cent of its par value, on the ground of fraud, etc., the corporation itself at the time being financially embarrassed and its then president acting under threats from the defendant of exposure of his having embezzled funds of the corporation. The Supreme Court of California held that the court below properly sustained a demurrer to the complaint of the corporation upon the ground that it did not state facts sufficient to constitute a cause of action.[2]

[1] J. W. Butler Paper Co. *v.* Jeffery, (1894) 151 Ill. 588.

[2] Bank of San Luis Obispo *v.* Wickersham, (1893) 99 Cal. 655; s. c., 34 Pac. Rep. 444. The court said, *arguendo:* "The [corporation] is not entitled to any relief because of the alleged fraud practiced upon it in the sale of the stock without a complete rescission of the contract of sale; and to effect this it was incumbent upon [the corporation] to act with reasonable diligence and return or offer to return to defendants the stock received from them under the contract. It cannot be permitted to retain the shares of stock thus received by it, and at the same time recover from defendants the

§ 205. Promoters of corporations accountable for profits. — The cases settle that it is incumbent upon a promoter of a corporation, if he wish to sell property of his own to it, to make full and fair disclosure of his interest and position with respect to the property, and to furnish the corporation with a board of directors capable of forming a competent and impartial judgment as to the wisdom of the purchase, and the price to be paid; and, if he do not, he will not be allowed to retain any profit he may

money paid to them as the purchase price of such stock. This would be contrary to justice, and can receive no countenance in a court of equity. There is no averment in the complaint of any offer on the part of [the corporation] to return the stock purchased and [it] apparently rested satisfied with the contract for more than fifteen years. Counsel for [the corporation] do not dispute the general proposition that, to entitle one to rescind a contract, he must restore to the other party every thing of value received from him under such contract; but it is claimed by them that the stock was extinguished by the sale, and, therefore, cannot be legally returned, and that all defendant Wickersham can justly claim is to receive in the statement of the accounts demanded in the complaint a credit for the value of such stock at the time of the sale. We do not agree with counsel on this point. The shares of stock were not extinguished by the sale in such sense that they could not be reissued by [the corporation] to any one subsequently subscribing for shares of its capital stock. [The corporation's] purchase did not reduce the number of shares which [it] was authorized to issue by its articles of incorporation. The only effect of the transaction was to reduce the amount of the subscribed capital stock leaving the [corporation] free to again issue the same number of shares to any one desiring to subscribe for its capital stock. Cook Stock & S. §§ 282, 314; 1 Moraw. Priv. Corp. § 114; State *v.* Smith, 48 Vt. 266; Williams *v.* Manufg. Co., 3 Md. Ch. 451; Railway Frog Co. *v.* Haven, 101 Mass. 398. The contract of sale was *ultra vires*, and resulted in an illegal withdrawal of [the corporation's] capital actually paid in, but the stock was not actually extinguished, and so long as there remained that number of shares of its capital stock unsold the [corporation] could at any time have issued a new certificate therefor, and tendered the same to the defendants which would in legal effect have been a tender of the same shares sold by them to [the corporation]." In Coal Co. *v.* Lotspeich, (Ky.) 20 S. W. Rep. 378, the president of the coal company entered into a contract with one of the stockholders to deliver to him a quantity of coal, the pay therefor to be applied on the payment of the individual indebtedness of the president to the stockholder. The stockholder brought an action to enforce the contract and asked to be permitted to apply the price of the coal on the debt. The Kentucky Court of Appeals, in passing upon the question, said: "The pleadings do not present the question of fraud by way of defense, but, nevertheless, in construing a contract made between officers of a corporation, by which a corporate liability is attempted to be created to the one officer or the other, that construction should be placed on terms most favor-

have made out of the corporation in such a sale.[1] It appeared in a case reserved from the Superior Court for the adjudication by the Supreme Court of Errors for Connecticut, that the promoter of a corporation had secretly agreed with a patentee to form this corporation to buy his patent, the patentee to pay the promoter half of the price paid for the patents. The promoter induced subscriptions to the stock of the corporation by stating that he was subscribing on equal terms with the rest, and being elected a director, voted for the resolution to buy the patents. The Supreme Court held that the corporation might recover of him (the promoter) his secret profits, and that it was not obliged to rescind the purchase, and so destroy its own reason for being. The secret contract between the promoter and the owner of the patents was held by the court to be void as against public policy.[2]

able to the corporation; and particularly when the great weight of the evidence, and in fact all of it, shows that corporate property was being held, by reason of this contract, to pay an individual debt of one director to the other."

[1] Plaquemines Tropical Fruit Co. *v.* Buck, (N. J. Eq. 1893) 27 Atl. Rep. 1094, in which the chancellor reviews the cases and discusses the subject at large.

[2] Yale Gas Stove Co. *v.* Wilcox, (1894) 64 Conn. 101; s. c., 29 Atl. Rep. 303. The court reviewed a number of cases to which the defendant's counsel had cited it, and then discussed the relations of promoters to the corporations which they helped to form, as follows: "A 'promoter' has been defined to be a person who organizes a corporation. It is said to be not a legal, but a business term, 'usefully summed up in a single word, a number of business operations familiar to the commercial world by which a company is generally brought into existence.'" Bowen, J., in Printing Co. *v.* Green, 28 Wkly. Rep. (Q. B. Div. 1880) 351, 352. That such persons occupy a fiduciary relation toward the company or corporation whose organization they seek to promote is well settled by the decisions of both [America and England]. Lord Cotton prefers to call them "trustees." Bagnall *v.* Carlton, 6 Ch. Div. 385. Sir George Jessel, M. R., in a case (Phosphate Co. *v.* Erlanger, 5 Ch. Div. 73) said: "Promoters stand in a fiduciary relation to that company which is their creature." In Erlanger *v.* Phosphate Co., L. R., 3 App. Cas. 1218, the lord chancellor said of promoters: "They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company. They have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property of themselves (the promoters) it is, in my opinion, incumbent upon the promoters to take care that, in forming the company, they provide it with an

§ 206. Promoters obtaining stock of corporation for nothing.— In a case in the federal court it appeared that two individuals, as promoters of a projected corporation, entered into an agreement with the owners of certain patents and this proposed corporation, by which a certain number of shares were to

executive; that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint-stock company and then sell his property to it; but I do say that if he does, he is bound to take care that he sell it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person." Continuing, "Lord O'HAGAN, referring to the same subject, expressed a similar opinion in even more emphatic language, declaring that, while an original purchase might be legitimate, and not less so because the object of the purchaser was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction, yet 'the privilege given them for promoting such a company for such an object involved objections of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness and a careful regard to the protection of the future stockholders.'" The test, therefore, of the validity of such transactions is that it must, in all its parts, be open and fair, so that the promoters shall not, in fact, substantially act both as vendors and vendees, and in the latter capacity approve a transaction suggested by them in the former. Foss *v.* Harbottle, 2 Hare, 461, 468; McElhenny's Appeal, 61 Pa. St. 188; Simons *v.* Vulcan Oil & Mining Co., 61 Pa. St. 202; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; Pittsburg Mining Co. *v.* Spooner, 74 Wis. 307; s. c., 42 N. W. Rep. 259; South Joplin Land Co. *v.* Case, 104 Mo. 572; s. c., 16 S. W. Rep. 390; In re British Seamless Paper Box Co., 17 Ch. Div. 467; Sewage Co. *v.* Hartmont, 5 Ch. Div. 394. In the last case the distinctive feature was that the vendors paid the commission to the trustees, who received the property on behalf of the company. They were compelled to pay it to the company. In Hichens *v.* Congreve, 1 Russ. & M. 150 (on appeal, 4 Russ. 562), three promoters induced their company to buy a mine for £25,000, of which they received from the vendor, and divided among themselves, £15,000. This they were compelled to account for to the company. Similar cases are Beck *v.* Kantorowicz, 3 Kay & J. 230; Printing Co. *v.* Green, 28 Wkly. Rep. (Q. B. Div. 1880) 351; Mining Co. *v.* Grant, 11 Ch. Div. 918; Bagnall *v.* Carlton, 6 Ch. Div. 385; Kent *v.* Brickmaking Co., 17 Law T. (N. S.) 77; Water Co. *v.* Flash, 97 Cal. 610; s.c., 32 Pac. Rep. 600. See, also, Mallory *v.* Mallory-Wheeler Co., 61 Conn. 135; s. c., 23 Atl. Rep. 708, and the recent English case: In re North Australian Territory Co., Archer's Case, (1892) 1 Ch. 322. See, also, Ore Co. *v.* Bird, 33 Ch. Div. 85; Gover's Case, 1 Ch. Div. 182; Atwool *v.* Merryweather, 37 L. J. Ch. 35; Sewage Co. *v.* Hartmont, 5 Ch. Div. 395; Pittsburg Mining Co. *v.* Spooner, 74 Wis.

be issued to these owners for the patents. They then offered the public an option to take stock in the corporation, disclosing the purchase of the patents, and that a portion of the stock was to be issued to the former owners in part payment, but not that they were to have stock on different terms or conditions. They were elected president and treasurer of the corporation as was further agreed between them and the owners of the patents. They succeeded in placing a large amount of the stock at seven dollars per share, obtaining their own stock for nothing. In this action against them it was held that they occupied a fiduciary relation to the other shareholders, and were liable to account in one of several modes for the benefit of the shareholders.[1] As to the measure of damages, the court said: "I think the company had a right to elect, (1) whether they would have the shares transferred back to them; or (2) if the shares had been sold, that these defendants should turn over the entire profit made by the sale; or (3) that the company may say, 'Although you have derived no profit by selling the shares, yet you deprived us of placing them with other persons, and you must, therefore, pay us the sum we have lost by reason of our being deprived of the right of placing these shares with other persons.'"[2]

307; s. c., 42 N. W. Rep. 259; 24 Am. & Eng. Corp. Cas. 1; In re Cape Breton Co., 26 Ch. Div. 221; s. c., on appeal, 29 Ch. Div. 795; Ladywell Mining Co. *v.* Brookes, 34 Ch. Div. 398; s. c., on appeal, 35 Ch. Div. 400.

[1] Chandler, Receiver, *v.* Bacon, (1887) 30 Fed. Rep. 538; Browne *v.* National Color Printing Co., ibid. COLT, J., said: "The defendants could not lawfully [take their shares of stock without consideration, while other stockholders paid seven dollars per share]. As promoters of the new company, they occupied a fiduciary relation towards it similar to that of agent to a principal, and they had no right in these negotiations to derive any advantage over other stockholders without a full and fair disclosure of the transactions, and any secret profits so made they must refund to the company. That this may have been done without any fraudulent intent, or that the price paid for the patents was fair and reasonable, cannot retrieve these defendants. The law forbids them, from their position, to secretly derive any benefit over other stockholders, and makes them accountable to the company for any profit so derived." Citing Bagnall *v.* Carlton, 6 Ch. Div. 371; Whaley, etc., Co. *v.* Green, 5 Q. B. Div. 109; Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. Div. 73; Emma Silver Mining Co. *v.* Grant, 11 Ch. Div. 918; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; McElhenny's Appeal, 61 Pa. St. 188; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202; Emery *v.* Parrott, 107 Mass. 95; Getty v. Devlin, 54 N. Y. 403.

[2] Chandler, Receiver, *v.* Bacon, (1887) 30 Fed. Rep. 638; Browne *v.* National Color Printing Co., ibid.; citing Carling's Case, 1 Ch. Div. 115, 126, 127;

§ 207. Jurisdiction of equity courts as to breaches of trust, etc.— The United States Supreme Court long since accepted as settled law, both in England and the United States, that courts of equity in both countries have a jurisdiction over corporations, at the instance of one or more of the stockholders, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals in profits, which might result in lessening the dividends of stockholders or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create whatever the law denominated a breach of trust. And the jurisdiction extends to inquire into and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if franchise, or the denial of a right growing out of it, is involved, for which there is not an adequate remedy at law.[1] In a case where the directors recognized their duty to resist the collection of a state tax upon the corporation (a bank), their refusal to do so was held to be an act contrary to the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchise of the bank, and was a breach of trust; that it amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made.[2] Officers and directors of a corporation, being trustees of the stockholders, in securing to themselves an advantage not common to all the stockholders, as, for instance, executing a mortgage to themselves, to secure indebtedness of the corporation to themselves, would be guilty of an unauthorized act, plainly a

McKay's Case, 2 Ch. Div. 1; De Ruvigne's Case, 5 Ch. Div. 306; Nant-y-glo, etc., Co. *v.* Grave, 12 Ch. Div. 738. Contracts with promoters, see Bash *v.* Culver Gold Mining Co., 7 Wash. 122; s. c., 34 Pac. Rep. 462; Weatherford, M. W. & N. W. R. Co. *v.* Granger, (Tex. Civ. App.) 23 S. W. Rep. 425; Winters *v.* Hub Mining Co., 57 Fed. Rep. 287; Burbank *v.* Dennis, (Cal. 1894) 35 Pac. Rep. 444; Cornell *v.* Corbin, 64 Cal. 197; s. c., 30 Pac. Rep. 629; Ex-Mission Land & Water Co. *v.* Flash, 97 Cal. 610; s. c., 32 Pac. Rep. 600.

[1] Dodge *v.* Woolsey, (1855) 18 How. 331; citing Cunliffe *v.* Manchester & Bolton Canal Co., 2 Russ. & Mylne Ch. 480, *n.;* Ware *v.* Grand Junction Water Co., 2 Russ. & Mylne, 470· Bagshaw *v.* Eastern Union Railway Co., 7 Hare Ch. 114; Ang. & Ames on Corp. (4th ed.) 424.

[2] Dodge *v.* Woolsey, (1855) 18 How. 331.

breach of trust, for which a stockholder would be entitled to a remedy in a court of chancery.[1] Contracts made by the directors of a railroad corporation for the construction of the road, for running cars of another corporation upon its road, for mining its coal lands and purchasing the coal so mined, which allow exorbitant prices for work done and material furnished, that are advantageous to the other contracting parties and injurious to the railroad corporation, in which the directors, or a controlling majority of them, are interested adversely to the corporation, in short, contracts made with themselves, are frauds such as courts of equity will relieve against in a proper case.[2] For such acts the remedy would be as follows: Parties who make such contracts and receive the pecuniary benefit of them can at law be made responsible in damages, or held in equity to compensation for the loss suffered. In a proper suit such contracts may be adjudged void, and then an accounting ordered, on the basis of a fair compensation for what may have been done in the way of construction, building, opening mines, furnishing coal, etc., and what had been received for such work and materials. But this can be done only in an action brought by *bona fide* stockholders who may have taken no part in and had no interest in the fraudulent contracts, in case the corporation be disabled to complain.[3] The directors of a joint-stock corporation, who willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good that loss; and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust.[4] And a court of equity has jurisdiction to entertain a suit to enforce the proper remedy in such a case. If the corporation, or the then present directors of the corporations and the parties who have made themselves answerable for the loss, refuse to bring such a suit, then an action will lie in the name of a stockholder in his own behalf or in behalf of all.[5] The chancellor

[1] Koehler *v.* Black River Falls Iron Co., (1862) 2 Black, 715; citing Ang. & Ames on Corp. (ed. 1861) § 312; The Charitable Corporation *v.* Sutton, 2 Atk. 404; Robinson *v.* Smith, 3 Paige, 220; Hodges *v.* New England Screw Co., 1 R. I. 312; York & North Midland Ry. Co. *v.* Hudson, 19 Eng. L. & E. 361.

[2] United States *v.* Union Pacific Railroad Co., (1878) 98 U. S. 569, 609, 610.

[3] Ibid.

[4] Robinson *v.* Smith, (1832) 3 Paige, 222, a case involving the loss of corporate funds by a speculation in stocks of other corporations by the directors.

[5] Ibid.

held in this case that independent of the Revised Statutes of New York the Court of Chancery had jurisdiction, so far as the rights of the individual corporators were concerned, to call the directors to account, and to order them to make suits of action for losses arising from a fraudulent breach of trust.[1] And in such suits the corporation is a necessary party.[2] Directors, like any other trustees, may be restrained from the performance of unauthorized acts, or to rescind and cancel them when performed. And the stockholders, occupying the relation of *cestuis que trust*, may invoke the aid of equity to thus protect their interests.[3] Officers of a corporation may be compelled by a court of equity to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally.[4] Where directors of a corporation have so mismanaged its affairs as to be fraudulent, a bill may be maintained against them personally by a stockholder. The stockholder may, in such case, interpose for the protection of the corporation.[5] In a stockholder's action brought by himself on behalf of a corporation against its officers for misapplication and misappropriation of its funds and charging a violation of trust on their part, the right of action in the corporation must be alleged, just as if the action had been brought by the corporation. And he cannot join in the action causes of action accruing to

[1] Ibid. See, also, Scott *v.* Depeyster, 1 Edw. Ch. 513; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553; Cross *v.* Sackett, 16 How. Pr. 63.

[2] Robinson *v.* Smith, (1832) 3 Paige, 222; Cunningham *v.* Pell, (1836) 5 Paige, 607.

[3] Chetlain *v.* Republic Life Ins. Co., (1877) 86 Ill. 220.

[4] Neall *v.* Hill, 16 Cal. 145.

[5] Watts' Appeal, (1875) 78 Pa. St. 370. In Bank of St. Marys *v.* St. John, Powers & Co., (1854) 25 Ala. 566, 609, an action to enforce the liability of directors of a bank for unfaithful management of its affairs, the Supreme Court of Alabama, as to there being no equity in the bill, speaking through LIGON, J., said: "It may be remarked that strict trusts are admitted to be open at all times to the examination of a court of equity, and an unfaithful trustee has been constantly brought before it, and made both to discover the fund belonging to the trust and to account for its management and misapplication. If fraud in the management of the fund is charged in the bill, by one interested in the trust estate, and who has been injured in consequence of such fraud, there is no doubt of the jurisdiction of the court. If, superadded to the matters of trust and fraud, the bill, as in this case, seeks a discovery and account, it will embrace nearly every ground on which the original jurisdiction of the Chancery Court is said to rest. In such case it is immaterial whether a court of law can afford to the complainant partial or full relief, in the matter complained of; it cannot hinder the aggrieved party from resorting to a court of equity for redress."

himself personally with causes of action belonging to the corporation.[1]

§ 208. When a court of equity is not open to the complaints of stockholders.— A company was organized upon property, and not cash, as its capital, bonds and stock being issued to the organizers and owners of the land, their respective holdings being in proportion to their rights in the property. The stockholders, and the holders of the bonds as well, filed a bill in equity complaining of the management of the company's affairs by its officers. The court held that stockholders, after voting for and approving of an appropriation of corporate funds to a purpose fairly within the scope of the corporate powers, will not, in the absence of fraud, be heard to complain thereof in a court of equity. Neither can they proceed in chancery to protect their equitable rights, unless the corporation has been dissolved, or has itself been prevented from proceeding by the misconduct of its officers.[2] GOFF, Circuit Judge, in his opinion, states the complaints of these stockholders and declares as to the rights of stockholders as follows: "As stockholders the complainants are interested in the proper management of the company; in the payment of all its liabilities; in the sale of its real estate, and the distribution of its assets. They charge that the funds of the company have been wasted, and its assets misappropriated and diverted to purposes wholly foreign to those for which it was organized, to their loss and injury. I do not find that these charges are sustained. The appropriations, donations and subscriptions to stock by the company to the various purposes and enterprises set forth in the bill were all made with the assent of the stockholders, including complainants, most of whom voted for them, as they were in the line of the enterprise in which the company was engaged, and to which the stockholders were committed. It was simply an effort to carry out the object had in view when the company was organized, for which the one-fourth portion of the income received from the sale of lots was set apart, as was provided in the charter and nominated in the bond. I find that the stocks and bonds held and owned by defendant,

[1] Whitney *v.* Fairbanks, (1893) 54 Fed. Rep. 985; citing Briggs *v.* Spaulding, 141 U. S. 132; s. c., 11 Sup. Ct. Rep. 924.

[2] McGeorge *v.* Big Stone Gap Imp. Co., (1893) 57 Fed. Rep. 262.

issued by other corporations, were purchased and secured with the one-fourth part so received, and not with trust funds to which the bondholders were entitled. The directors of the defendant seem to have advised fully with its stockholders, and consulted with its bondholders, more so than is usually done; and, as the evidence discloses, they were always governed by the advice received. It is true that a number of the enterprises that were assisted with the funds of the company have not as yet developed into remunerative investments by demonstrating their dividend-earning capacities. Still the evidence shows that the officers honestly endeavored in these instances to enhance the interest of the company, and that, in their efforts, they had the approval of the stockholders and the commendation of the present complainants. It is clearly shown that complainants were not only aware of the proceedings had at the meetings of the stockholders and directors, when the expenditures complained of were authorized, but that they gave them their cordial support." Upon this statement of the facts the court held that the bill of the complainants was not maintainable.[1]

[1] Ibid. *Arguendo*, it was said: "Stockholders of a corporation that has been managed without fraud will not be permitted after they, for reasons of their own, have become dissatisfied with the plan of organization, or the management thereof, to force the abandonment of the business, and compel the majority of the stockholders to submit to the will of the minority by the decree of a court of equity. If they had this power it would frequently be exercised to the detriment of the corporation, the very existence of which might be thus destroyed, or the value of its stock seriously impaired. Rival companies might make it to the interest of this minority so to act, or the stock of a corporation might be purchased with such object in view, and the result would be that the security relied upon by those investing in corporate property would be seriously impaired. The charters under which corporations are organized, and the laws by virtue of which they are created, provide the way in which they shall be managed, as well as the mode of voting the stock and the manner of electing the officers thereof; and, if these provisions have been fairly complied with, then there is no ground for the interference of a court of equity at the complaint of a dissatisfied minority shareholder. If he disapproves of the management that has been conducted without fraud, and under the requirements of the law, his only remedy is to elect new officers in favor of another policy by appealing to the stockholders, or, failing in that, to sell his stock and retire. Certainly, the equity courts of the country will not undertake to manage it for him, nor will they, under such circumstances, take jurisdiction for the purpose of closing up the affairs of the corporation. Such power is never exercised in the absence of a statute giving the jurisdiction, and I find no such enactment applicable to this case. In the absence of such legislation the

§ 209. Remedy in equity.— A stockholder may bring a suit in equity where a president of a corporation which has been steadily earning profits has received the same and not accounted for them, and the directors are under his influence and control and mere instruments to do his bidding, and have surrendered the entire control of the affairs of the corporation to him, for such relief

business matters of a corporation can only be controlled, or its charter privileges taken from it, by the proper and usual proceedings in such cases provided in the courts of law. Chancellor KENT," said the court, "in a leading case on this subject, said: 'I admit that the persons who from time to time exercise the corporate powers may, in their character of trustees, be accountable to this court for a fraudulent breach of trust, and to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined.' Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371. 'It cannot be concealed,' said the chancellor in Bayless *v.* Orne, 1 Freem. Ch. (Miss.) 173, 'that to decree the prayer of complainant's bill would be to decree a dissolution of the corporation. In this respect it differs materially from bills which have frequently been entertained by courts of equity at the instance of stockholders against the directors of a corporate company to compel them to account for the improper use of funds, or to restrain them from violating their trust. That a court of equity, as such, has not jurisdiction or power over corporate bodies for the purpose of restraining their operations, or winding up their concerns, is, I think, well settled by various authorities.'" See on this subject Verplanck *v.* Insurance Co., 1 Edw. Ch. 84; Attorney-General *v.* Bank of Niagara, 1 Hopk. Ch. 354; Neall *v.* Hill, 16 Cal. 145. In Treadwell *v.* Salisbury Manufg. Co., 7 Gray, 393, it is said: "Indeed, it is too well settled to admit of question that a court of chancery has no peculiar jurisdiction over corporations to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. Their rights and duties are regulated and governed by the common law, which, in most cases, furnishes ample remedies for any excess or abuse of corporate powers and privileges, which may injuriously affect either public or private rights. It is only when there is no plain and adequate remedy at law, and a case is presented which entitles a party to equitable relief, under some general head of chancery jurisdiction, that a bill in equity can be maintained against a corporation. And this rule is applicable to stockholders as well as to other persons." See Ang. & A. Corp. § 312; Grant on Corp. 71, 271; Mozley *v.* Alston, 1 Phil. Ch. 790; Hodges *v.* Screw Co., 1 R. I. 350; Baker *v.* Railroad Co., 34 La. Ann. 754. The circuit judge resumed: "The rule is also well established that a corporation claiming redress for wrongs must proceed through its regularly appointed agents. It is only when the company has been dissolved, or is prevented from proceeding by the misconduct of its officers, that the stockholders may themselves proceed in chancery for the protection of their equitable rights. If the directors refuse to act, or are themselves guilty of a wrong that the majority of the stockholders refuse to correct, equity will interfere at the

as he may be entitled to.[1] And in addition to these facts, should it appear that a number of the directors, especially if including a relative of the president, are not *bona fide* stockholders, but made such merely by a voluntary transfer of stock to them by him to qualify them as directors, it may not be alleged that the directors have been requested to bring suit and refused.[2] One having a claim for a loss against a mutual insurance corporation is entitled to bring his bill in equity against the directors of such a corporation who, having funds belonging to it in their hands to pay the claim, have neglected and refused to pay it, and fraudulently applied the funds to other purposes.[3] The managers of a saving fund are liable in equity as trustees for the proper management of the fund.[4] The proper remedy for the defrauded depositors of a saving fund is a bill in equity against the directors of such an institution; and these directors, although ignorant of the fact of a fraud in its organization, will be liable to the depositors for the proper care and management of the deposits intrusted to its safe-keeping.[5] The directors of a saving fund will be held liable to the depositors for maladministration of their office, and suits may be brought by the depositors.[6] But directors who did

suit of a stockholder. Moraw. Priv. Corp. §§ 239, 381, 386; Moore *v.* Schoppert, 22 W. Va. 282, 291; Hawes *v.* Oakland, 104 U. S. 450, 460; Foss *v.* Harbottle, 2 Hare, 493. In this case the complainants allege that they control a majority of the shares of stock of the defendant. If that is so they will have no trouble in calling a stock holders' meeting of the company and therein so voting their stock as to correct the wrongs of which they now complain, and fully protect their interests in the future."

[1] Rogers *v.* La Fayette Agricultural Works, (1875) 52 Ind. 296.

[2] Ibid.; citing March *v.* Eastern R. R. Co., 40 N. H. 548; Robinson *v.* Smith, 3 Paige, 222; Dodge *v.* Woolsey, 18 How. 331; Brewer *v.* Boston Theatre, 104 Mass. 378; Hodges *v.* New England Screw Co., 1 R. I. 312; Goodin *v.* Cincinnati, etc., Co., 18 Ohio St. 169; Peabody *v.* Flint, 6 Allen, 52; Sears *v.* Hotchkiss, 25 Conn. 171; Wright *v.* Oroville Gold, Silver & Copper Mining Co., 40 Cal. 20; Allen *v.* Curtis, 26 Conn. 456.

[3] Lyman *v.* Bonney, (1869) 101 Mass. 562.

[4] Leffman *v.* Flanigan, (1863) 5 Phil. 155.

[5] Ibid.

[6] Maisch *v.* Saving Fund, (1862), 5 Phil. 30. SHARSWOOD, P. J., in his opinion, said: "We are by no means announcing any new doctrine when we say that the directors of corporations are responsible for gross negligence, as well as fraud, in the management of the interest intrusted to them. It has received the indorsement of courts of the highest character for learning. Robinson *v.* Smith, 3 Paige, 222; Scott *v.* Depeyster, 1 Edw. Ch. 513; Allen *v.* Curtis, 26 Conn. 456. No one doubts the personal liability of the president, treas-

not participate, and never took their seats in the board, and against whom there be no allegation of knowledge of the fraud, need not be held liable.[1] A president of a corporation may be called upon by bill in equity to account for and make restitution of any part of the property of the corporation confided to his care where he has improperly applied it to his own use.[2] Where by a contract with its president a corporation may deliver to him, its unissued stock, with power of sale, as security for money loaned the corporation by him, the contract will be enforced if shown to have been made for the benefit of the corporation, and to be just and fair.[3] An action by a stockholder to set

urer and other officers who are paid for their services. Why should there exist any doubt as to directors who are also officers? The difference is only in the measure and degree of their respective responsibility. It would be monstrous if a director could look on and see a cashier or treasurer embezzling the funds of a corporation and not be responsible if he gave no information, and took no measures to prevent it. Equally monstrous would it be to say that the directors of a saving fund, insurance office or bank should allow their names to go forth to the public in connection with representations of the nature and value of the assets which, if the ordinary means of examination and supervision had been resorted to, they would have easily discovered to be false. If they have such unbounded faith in the faithfulness and integrity of their officers as to trust the whole affairs of the corporation to their management, without any attention on their part, they must accept the alternative of responsibility for their conduct. It is important that the community at large should know this, and that gentlemen of wealth and respectability should be careful how they suffer their names to be held forth as the trustees or managers of institutions to which they have not the time or inclination to give their personal attention."

[1] Maisch *v.* Saving Fund, (1862), 5 Phil. 30. In Flagler Engraving Machine Co. *v.* Flagler, (1884) 19 Fed. Rep. 468, it appeared that the organizers of the joint-stock company put in as a part of the capital stock certain patent rights and by fraudulent puffing induced others to purchase the stock at fictitious prices. It was held that whether the purchasers could set aside the sales or not, they were not entitled to gain control of the company and pursue their remedy against the fraudulent directors in the name of the company.

[2] Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24.

[3] Ibid. In Pneumatic Gas Co. *v.* Berry, (1885) 113 U. S. 322; s. c., 5 Sup. Ct. Rep. 525, where the objection was made to a contract entered into with a director of the corporation seven years after its execution and had been repeatedly ratified, the Supreme Court of the United States said: "A court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal which had its approval, which were essential to its protection, and other benefits of which it has fully received. Complaints that its own directors exceeded their authority come with ill grace when the acts complained of alone preserved its existence." In Jesup *v.* Illinois Central R. Co., (1890)

aside a resolution of a board of trustees of a corporation fixing the salaries and compensation to be received by them respectively as secretary, treasurer and vice-president of the corporation, and to compel the restoration of the money paid them, although it is not binding upon the corporation and may at the election of the corporation be set aside, cannot be maintained unless he shows that the corporation ought to exercise its rights to avoid the resolution or contract made by its trustees in which they were personally interested.[1] The presumption does not arise in such an action that the trustees acted dishonestly, which must be overcome on their part by affirmative evidence, as it would in case the corporation had sought to set aside the contract.[2] A stockholder has a right of action for losses sustained by him by

43 Fed. Rep. 483, it was held that seasonable resistance could not be predicated of a case of a merely voidable contract, where the party complaining had not simply been silent for twenty years, but with knowledge of the facts, or with free opportunity to ascertain them, has enjoyed the fruits of the contracts, and treated it as valid. Mr. Justice HARLAN said generally: "The rule is a wholesome one that requires the court, in cases of merely voidable contracts, to withhold relief from those who, with knowledge of the facts, or with full opportunity to ascertain the facts, unreasonably postpone application for relief. A contract not wholly invalid when executed, nor prohibited by law, as relating to some illegal transaction, and which is, therefore, voidable only, may become, by the acts of the parties or by long acquiescence, binding upon them, especially where the nature of the property which is the subject of the contract is such that its value may be affected by its relations to other property of like kind, and by the changing business of the country." As to the right of one wishing to fix liability upon directors of a corporation on account of fraudulent transactions by which he had been endangered to file a bill for discovery against them personally, see Stebbins *v.* Cowles, (1835) 10 Conn. 399.

[1] MacNaughton *v.* Osgood, (1886) 41 Hun, 109.

[2] Ibid. As to the rule which would govern in case the corporation itself sought to set aside such a resolution, it was said by the court: "The corporation may avoid such a contract with its trustees, but cannot do so except upon equitable terms, and must restore to him what is received from him. Duncomb *v.* N. Y., H. & N. R. R. Co., 84 N. Y. 190. Hence the corporation, upon rescinding, ought to pay the reasonable value of the services of these officers, rendered in a department of labor beneficial to it, and outside of the duty of direction which the office of director implies. See Metropolitan Elevated Railway Co. *v.* Manhattan Railway Co., 14 Abb. N. C. at pages 258, 259, where the case of Jackson *v.* New York Central Railroad Co., 2 Sup. Ct. (T. & C.) 653; affirmed, 58 N. Y. 623, is commented upon, and other cases are cited in which the right of a director to recover for such services is shown to rest solely upon *quantum meruit*, and such, we have no doubt, is the law." That it must be a clear case demanding its interference before a court will

reason of the fraudulent acts and a misapplication or waste of the corporate funds and property by an officer of the corporation.[1] But before bringing, in his own name, an action against an officer of a corporation to recover damages for a fraudulent misappropriation and conversion by such officer of the corporate earnings and funds, he must first apply to the corporation to bring the action and the latter refuse to bring it. In case the corporation do refuse to bring the action, then the stockholder may bring it in behalf of himself and other stockholders, making the corporation a party defendant, alleging its refusal in his complaint and proving it.[2] And an action in his own name, without making the corporation a party defendant, to recover the difference between the actual loss and depreciation will not be authorized by the fact that the wrongful acts of the officer have depreciated the market value of the capital stock held by the stockholder to an extent greater than its share of the actual loss sustained.[3] Where the officers and trustees of a corporation alien and transfer the whole property of a corporation to one to enable him to appropriate it to his own use and to render valueless the stock of the corporation to effect a dissolution of the corporation without due process of law, and also to oust one who has been chosen to have the "management of the affairs of" the corporation for a stated time and for the purpose of defrauding its creditors, an action will lie to set aside such alienation as fraudulent.[4] And such manager would be a proper party to bring such an action under the New York Code of Civil Procedure, sections 1781, 1782, which provide that such an action may be brought by a creditor of the corporation, or by a trustee, director, manager, or

interfere with the management of a corporation, see Barnes v. Brown, 80 N. Y. 527; Chautauqua County Bank v Risley, 19 N. Y. 381; Hawes v. Oakland, 104 U. S. 460.

[1] Greaves v. Gouge, (1877) 69 N. Y. 154. As to a stockholder's having a remedy for losses produced by the fraud, culpable neglect of duty or a violation of law, on the part of an officer of the corporation, see Bissell v. Michigan Southern & N. I. R. R. Co., 22 N. Y. 275; Butts v. Wood, 37 N. Y. 317; Cross v. Sackett, 6 Abb. Pr. 247, 265; House v. Cooper, 16 How. Pr. 293; Mead v. Mali, 15 How. Pr. 347; Crook v. Jewett, 12 How. Pr. 19; Cazeaux v. Mali, 25 Barb. 578; Abbot v. Am. H. R. Co., 33 Barb. 578; Howe v. Deuel, 43 Barb. 505; Gardiner v. Pollard, 10 Bosw. 675; Gray v. New York & Virginia St. Ship Co., 5 T. & C. 224.

[2] Greaves v. Gouge, (1877) 69 N. Y. 154.

[3] Ibid.

[4] Beecher v. Schieffelin, (Spl. Term Sup. Ct. 1883) 4 N. Y. Civ. Pro. Rep. 230.

other officer of the corporation having a general superintendency of its affairs.[1] A treasurer of a corporation failing to pay over to it money which he has collected whereby the corporation is compelled to borrow money and to pay a rate of interest greater than six per cent in an action against him for the recovery of that money, would not be liable in equity to pay on the sums he had withheld more than six per cent interest should the bill not seek to recover any profits he had made.[2] Where stock of a corporation has been fraudulently issued by one of its officers and transferred to a third person as collateral security for a debt, it is in the power of a court of equity, upon a bill filed for the purpose by a stockholder, to order the certificates of such stock returned and canceled.[3] And in such a bill the corporation is not a necessary party.[4] A treasurer of a corporation who has sold for its benefit a bond issued by it, in case he is unable or refuses to disclose the exact amount for which he sold it, will be chargeable in equity for at least the full market value of the bond at the time of the sale.[5] In this case the treasurer of the corporation had purchased on his own account a quantity of coal, when it was not his duty as treasurer to purchase it, and with no intention of selling it to the corporation. He afterwards sold it to the corporation at its then fair market value, which was more than it cost him. It was held that he was not chargeable in equity for the difference in price between what he paid for it and sold it for to the corporation.[6] The Supreme Court of New York, in a case where two of the directors of a corporation acquired title to patents for use in the business in their own name, and transferred them to another corporation, which in turn assigned them to one of these directors as trustee, held that a decree that this director should assign all the interest which he held individually and as trustee in the patents to the receiver appointed in the action, and that both of these directors should account for all the profits they had made in the transactions was proper.[7] An action at law can-

[1] Ibid. As to the rules governing the bringing of suits to compel the ministerial officers of a private corporation to account for a breach of official duty or misapplication of corporate funds, see Hyde Park Gas Co. *v.* Kerber (1879) 5 Bradw. (Ill.) 132.

[2] Parker *v.* Nickerson, (1884) 137 Mass. 487.

[3] Campbell *v.* Morgan, (1879) 4 Bradw. (Ill.) 100.

[4] Ibid.

[5] Parker *v.* Nickerson, (1884) 137 Mass. 487.

[6] Ibid.

[7] Averill *v.* Barber, (1889) 53 Hun, 636; s. c., 6 N. Y. Supp. 255.

not be maintained by a stockholder of a corporation against the officers and directors of the corporation to recover damages for willful waste of the assets, by reason of which the value of his shares of stock may have been decreased, and he may have become liable to an assessment upon his shares. His remedy lies in a court of equity.[1] It should appear very clearly that the loss of a stockholder in a diminution of the value of his stock was occasioned by the gross negligence or willful misconduct of directors to charge the officers of a corporation with such loss which he may allege had been caused by their mismanagement.[2] While accountable in equity as trustees, in case the officers of a

[1] Hirsh *v.* Jones, (1893) 56 Fed. Rep. 137. McCormick, Circuit Judge, said: "The authorities are uniform in support of the proposition that where the cause of action affects all the interests of the corporation, as such, the corporation is the proper party to sue, and on its refusal to sue, or falling under the control of those liable to the suit, and thus not to be trusted to bring and conduct the action, the injured stockholder has his remedy in equity, and must seek it in that jurisdiction." Citing Kendig *v.* Dean, 97 U. S. 423; Dewing *v.* Perdicaries, 96 U. S. 193; Dodge *v.* Woolsey, 18 How. 341; Conway *v.* Halsey, 44 N. J. Law, 462.

[2] Neall *v.* Hill, 16 Cal. 145. As to the rule with reference to an action by a stockholder of a corporation against the directors for a misapplication of funds of the corporation, see Cogswell *v.* Bull, (1870) 39 Cal. 320; Parrott *v.* Byers, 40 Cal. 614. In Allen *v.* Curtis, (1857) 26 Conn. 456, an action on the case brought by a stockholder of a bank against the directors of the same for mismanagement and willful neglect on their part of the affairs of the bank which caused insolvency of the bank and a loss to him in the value of his stock, the case being referred to the Supreme Court of Connecticut on a demurrer, the court sustained the demurrer, and in their opinion said: "The general rule of law is, that an action at law must be brought by the person having the title or right to the damages which are sought to be recovered for the injury. Hence the *Woodbury Bank* should have brought this suit. It is *its* property which has been misappropriated and lost, and the damages to be recovered belong to it — to be sure — in trust for billholders, depositors and other creditors, if any there be, and finally for the stockholders, but for all of them and not for some of them exclusively. The *bank* then must sue. It may compromise and settle or release the defendants on terms mutually satisfactory, which the stockholders cannot do, and, should they do it, it would be no bar to a suit afterwards brought by the bank. In this respect the defendants are liable to the bank as any other agents or persons would be for robbing or defrauding it or in any way injuring the corporate property. * * * Besides the directors of the bank are the agents of the bank. The bank is the only principal, and there is no such trust for or relation to a stockholder as has been claimed by the plaintiff. The entire duty of the directors growing out of their agency is owed to the bank, which, under the charter, is the sole representative of the stockholders and the legal protector and defender of their property. Nor is any other

corporation have gone out of office, the remedy against them for an appropriation of corporate funds to their own use is at law and not in equity unless discovery is sought.[1]

§ 210. Malfeasance of the president of a corporation — a stockholder's remedy.— In a federal court a stockholder's bill in equity charged that the president of the corporation had taken possession and control of the moneys of the corporation, depositing them in bank in his own name, in defiance of the express provision of the by-laws, and drawing them out on his own check, in his own discretion, for his own purposes; that especially he had in his own hands the sum of $25,660, money of the corporation, which he had converted to his own use, and for which he failed and refused to account; that by this action, and the further misuse of the corporation's funds by lending them in his own name, this stockholder had failed to receive his proper share of the funds of the company in the shape of a dividend on his stock; that all his efforts to ascertain the truth about this misuse of funds by the president, on examination of the books, or in calling the president to an account therefor, had been baffled and defeated by the direct and active effort of the president himself, aided by the other officers, going so far as to receive and put a motion for investigation made at a stockholders' meeting, and that there was a definite purpose so to use the affairs of the company as to depress the stock so as to compel this stockholder to sell out at a loss. There was a general demurrer to the bill. The United States Circuit Court overruled the demurrer and sustained the bill.[2]

protector or defender necessary until the bank shall neglect its duty in refusing to call the directors to account; in which event, upon a case properly stated and with proper parties before the court, a court of equity may grant relief according to the existing exigency." Citing Smith *v.* Hurd, 12 Met. 371; Bishop *v.* Houghton, 1 E. D. Smith, 566; Ang. & Ames on Corp. § 312; Hodsdon *v.* Copeland, 16 Me. 314; Hersey *v.* Veazie, 24 Me. 9. See, also, Ruby *v.* Abyssinian Society, 15 Me. 306.

[1] Bay City Bridge Co. *v.* Van Etten, 36 Mich. 210.

[2] Ranger *v.* Champion Cotton-Press Co., (1892) 52 Fed. Rep. 611. SIMONTON, J., said, referring to the demurrer and its admissions: "Here we have the admission that a complaining stockholder in a trading corporation has been defrauded and deprived of his share of its property applicable to dividends, by the action of the president in misusing for his own purposes the moneys of the company. That every effort made by him to ascertain

§ 211. When a demand upon directors to bring suit is not required.— Certain stockholders of an Indiana corporation brought an action against the corporation and the officers of the same charging a conspiracy between the latter, they controlling a majority of the stock, by which in electing and continuing cer-

the facts connected with this charge have been thwarted by the positive and distinct refusal, at the hands of the president, made at an annual meeting of the stockholders, to give any information or explanation whatever. This admission is made. It is denied that a court of equity can give any relief. Strong, indeed, must be the formal or technical difficulties which will forbid this court from, at least, hearing such a complaint." The bill and the rights of the stockholder are then discussed in these words: "Does the bill make out *prima facie* a case for equitable relief? There can be no doubt that in a proper showing this court will come to the aid of a minority of stockholders. Dodge *v.* Woolsey, 18 How. 331. The doctrine is well stated in Waterman on Corporations (page 578, § 319): 'A court of equity will enjoin, on behalf of the stockholders, any improper alienation or disposition of the property, other than for corporate purposes, and will restrain the commission of acts which are contrary to law, and tend to the destruction of the franchises, as well the improper management of the business of the corporation, or a wrongful diversion of its funds, and in such case equity may grant relief at the suit of a single stockholder.'" The court resumed: "There are three classes of cases in which stockholders may complain. A minority may object to the business policy pursued by the majority, as tending to injure, perhaps destroy, their interests. In such cases the court will seldom or never interfere. The majority must govern, unless there be a palpable abuse of power, or an interference with vested rights. Another class of cases is where the rights and interests of a corporation as a whole are threatened by the action of a third party, an outsider, and the corporate authorities, through inadvertence, negligence or willfulness, will not move in their defense." In such cases, following Dodge *v.* Woolsey, *supra,* the courts of the United States lent a ready ear to the complaint of stockholders who interfered in behalf of the corporate rights. But this indulgence of the courts was greatly abused. Many cases were brought in the United States courts in which the jurisdiction was secured by collusion between a non-resident stockholder and the corporation which itself could not come into this court. This abuse was rebuked in Hawes *v.* Oakland, 104 U. S. 450. The evil was cured by the passage of the ninety-fourth equity rule, consequent on this case. This rule, by its terms, is made applicable to "every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation." Hawes *v.* Oakland (page 454) shows that these words, "other parties," means "an outsider." But this case, and the rule consequent upon it, do not apply to cases in which there is a real contest between the stockholder and his corporation. Leo *v.* Railway Co., 17 Fed. Rep. 273. Hawes *v.* Oakland draws the distinction broadly and clearly: "That the vast and increasing proportion of the active business of modern life is done by corporations, should call into exercise the beneficent

tain ones of them as officers they were enabled to, and did, misappropriate and waste the funds of the corporation, by a system of paying exorbitant and unreasonable salaries to each other as officers and thus disabled the corporation to declare dividends, there being many different allegations of wrongdoing on their part in the complaint. The Supreme Court sustained the overruling of the demurrers to each of the allegations in the

powers and flexible methods of courts of equity is neither to be wondered at nor regretted, and this is specially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. * * * The case before us goes beyond this." After stating that case and the principle of Dodge *v.* Woolsey, in both of which the action of an outsider was the *gravamen* of the complaint, the court adds (page 454): "This is a very different affair from a controversy between the shareholder of a corporation and the corporation itself, or its managing directors or trustees, or the other shareholders who may be violating his rights, or destroying the property in which he has an interest." SIMONTON, J., then refers to the case before him: "The bill in this case does not complain of any business policy on the part of the corporation or of the other stockholders, nor does it charge supineness, or neglect or collusion with any attack on corporate rights, interests or privileges, by an outsider. The complainant charges that the president has converted to his own use moneys of the company in which, as a stockholder, complainant has an interest, because they were applicable to dividends; that the president misuses his powers, and conducts the business of the corporation to his own purposes; that he controls and uses, in his own private banking account, and for his own private purposes, all the funds of the company, against the express provisions of the by-laws, and that in this he is sustained by the officers of the company, who aided him in a peremptory refusal even to consider a motion of inquiry on this subject, made at a general meeting of stockholders. He charges that his own personal rights are infringed, and for this he seeks his remedy. As his rights are similar to those of the other stockholders, he makes them parties to his suit, as parties in interest, so that they may take sides as they are advised, and, at least, may be present at the division of the common property, and see that he gets his just share and no more. His prayer is that the money unlawfully converted be returned, and out of it a dividend be declared, and that he get his dividend. This is a suit within the corporation, concerning no one but the stockholders and the company, seeking rights, claimed as a stockholder, against the company and other stockholders. The complainant could not work out his case through the corporation." The court then stated the particular facts as to who hold the stock and are officers, and said: "Under these circumstances, it would be absurd to require the complainant to ask these gentlemen to institute, in

complaint, holding that each one of them stated a cause of action against the defendants. One of the main contentions of the defendants was that there should have been a demand upon them to bring the action and an allegation in the complaint that it had been made. The court held this was particularly a case in which such a demand upon the directors was not required.[1]

the name of the corporation, a suit against [the president] involving the grave charges of this suit. Tazewell Co. *v.* Farmers' L. & T. Co., 12 Fed. Rep. 752; Heath *v.* Railway Co., 8 Blatchf. 347."

[1] Wayne Pike Company *v.* Hammons, (1891) 129 Ind. 368. *Arguendo*, it was said: "Conceding that the cases are numerous in which such demand is necessary, we do not think this case belongs to that class. In this case something more than a mere accounting is sought, namely, the appointment of a receiver to take charge of the corporate property. The parties out of whose hands it is proposed to take the management of the affairs of the corporation, and who are called upon to account for a misappropriation and conversion of the corporation assets, constitute a majority of the directors. It would not be reasonable to require those who are charged with a conversion of the assets to bring suit in the name of the corporation against themselves, and to furnish the proof to sustain the charge, and at the same time ask the court to take the property from their charge on account of their misconduct. Such a suit would be a farce, and it would be beyond reason to refuse the appellees relief because they did not demand that such a proceeding be had before they commenced their suit. Cook on Stocks & Stockholders, section 741, in treating this subject, says: 'There are occasions when the allegation that the stockholder has requested the directors to bring suit, and they have refused, may be omitted since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves.' The author cites many authorities which fully support the text. Mr. Waterman, in his work on Corporations, vol. 1, page 467, says: 'The corporation may call its officers to account if they willfully abuse their trust or misapply the funds of the company; and if it refuses to sue, or is still under the control of those who must be made defendants in the suit, the stockholders who are the real parties in interest may file a bill in their own names, making the corporation a party defendant, or part of them may file a bill in behalf of themselves and all others standing in the same relation. Where a majority of the stock of a corporation is held by one family, who vote away the corporation profits for salaries, a court of equity will remedy the fraud. Cook Stock & Stockholders, section 567. In the case of Carter *v.* Ford, etc., Co., 85 Ind. 180, it was held that where the corporation was in the hands of its enemies the stockholders might maintain an action, which, if successful, would inure to the benefit of the corporation.' See, also, Rogers *v.* La Fayette, etc., Works, 52 Ind. 296. 'The officers of a corporation are its agents, and they are governed by the rules of law applicable to other agents, as between themselves and their principal, in so

§ 212. When a stockholder may bring an action.—It appearing in a case that a stockholder had written to the president of a corporation to take action against certain directors for breaches of their trust, and he replied that he had resigned the presidency two years before this time, and further that the directors complained of were the active managers of the business, and there being no evidence that any successor to the president had been elected in the meantime, the Supreme Court of New York held that the stockholder could properly bring an action in his own name against these directors.[1] An action for an accounting and an injunction in the name of a corporation may be authorized and maintained by the president of a corporation who is also a trustee, without the authority of the board of trustees, or against

far as such rules relate to honesty and fair dealing in the management of the affairs of their principal. They can no more use the business of their principal for their own private gain than any other agent, and should they do so they should be held to the same strict rule of accountability as the agent of a private person. Port v. Russell, 36 Ind. 60; Aberdeen Railway Co. *v.* Blakie, 1 Macq. 461; Michoud *v.* Girod, 4 How. 502; Cumberland, etc., Co. *v.* Sherman, 30 Barb. 553. If the appellants conspired together for the purposes alleged in the complaint, each became liable for any act done by any of the three in furtherance of the common design. By the act of conspiring together the conspirators assumed to themselves the attribute of individuality so far as regards the proscution of the common design, thus rendering what was said or done by any one in furtherance of the design, the act of all. [Citing authorities.]'"

[1] Averill *v.* Barber, (1889) 53 Hun, 636; s. c., 6 N. Y. Supp. 255. As to the general rule in such cases, see Doud *v.* Wisconsin P. & S. Railway Co., 65 Wis. 108; s. c., 25 N. W. Rep. 533; Boyd *v.* Sims, 3 Pickle (Tenn.), 771; s. c., 11 S. W. Rep. 948; Bacon *v.* Irvine, 70 Cal. 221; 11 Pac. Rep. 646; Dannmeyer *v.* Coleman, 11 Fed. Rep. 97; City of Detroit *v.* Dean, 106 U. S. 537; s. c., 1 Sup. Ct. Rep. 560; Rathbone *v.* Parkersburg Gas Co., 31 W. Va. 798; s. c., 8 S. E. Rep. 570; Alexander *v.* Searcy, 81 Ga. 536; s. c., 8 S. E. Rep. 630; City of Chicago *v.* Cameron, 120 Ill. 447; s. c., 11 N. E. Rep. 899; Dunphy *v.* Traveller Newspaper Association, 146 Mass. 495; s. c., 16 N. E. Rep. 426; Allen *v.* Wilson, 28 Fed. Rep. 677; Slattery *v.* St. Louis & N. O. Transportation Co., 91 Mo. 217; s. c., 4 S. W. Rep. 79; Taylor *v.* Holmes, 127 U. S. 489; s. c., 8 Sup. Ct. Rep. 1192; Dimpfel *v.* Ohio & M. Railway Co., 110 U. S. 209; s. c., 3 Sup. Ct. Rep. 573; McHenry *v.* Railroad Co., 22 Fed. Rep. 130; Foote *v.* Mining Co., 17 Fed. Rep. 46; Bill *v.* Telegraph Co., 16 Fed. Rep. 14; City of Quincy *v.* Steel, 120 U. S. 241; s. c., 7 Sup. Ct. Rep. 520; Byers *v.* Rollins, 13 Colo. 22; s. c., 21 Pac. Rep. 894; Poole *v.* Association, 30 Fed. Rep. 513; Wilcox *v.* Bickel, 11 Neb. 154; s. c., 8 N. W. Rep. 436; Davis *v.* Gemmell, 70 Md. 356; s. c., 17 Atl. Rep. 259; Hazeltine *v.* Belfast & M. L. Railroad Co., 79 Me. 411; s. c., 10 Atl. Rep. 328; Oliphant *v.* Woodburn C. & Mining Co., 63 Iowa, 332; s. c., 19 N. W. Rep. 212.

its express direction where a majority of the trustees may have wrongfully converted corporate funds and threaten to convert other of the funds, especially where the neglect of the board of trustees to sue, and its resolution to discontinue a suit already commenced, are simply acts in furtherance of the unlawful design of the majority of the trustees.[1] Where the assignee in

[1] Recamier Manufg. Co. *v.* Seymour, (Com. Pl. New York City, 1889) 5 N. Y. Supp. 648. In Merchants & Planters' Line *v.* Waganer, (1882) 71 Ala. 581, a stockholder's action against the corporation and certain directors based upon alleged mismanagement, etc., STONE, J., asks: "Have the complainants averred sufficient facts to authorize them, representing, as they do, a minority of the stock, to come into equity for the redress of the wrongs they complain of while the corporate powers are still in exercise?" and answers as follows: "Very true, the present bill charges that three, a majority of the directors, have combined and formed a ring for their own private profit, at the expense of the other stockholders and many acts of wrongdoing are charged against those three directors. No act is charged that is *ultra vires*, and there is no averment that the corporation effects are imperiled by the insolvency of the parties. Neither is there averment in the bill that any request has been made known, soliciting the use of the corporate name in bringing suit against the alleged offenders. Nor is it shown that any attempt has been made to obtain a meeting of the stockholders. In Tuscaloosa Manufacturing Co. *v.* Cox, 68 Ala. 71, the questions presented arose on bill filed by a minority of stockholders. True, the abuses charged in that case were less flagrant than those complained of in this; but the difference is in degree, not in kind. In that case we ruled that complainants had shown no ground for equitable relief. We said: 'In the government of corporations much must be left to the judgment and discretion of the directory, and much must be credited to the fallibility of human judgment. If it be supposed an unwise course is being pursued, or that the interests of the corporation are suffering, or likely to suffer though the inefficiency or faithlessness of an official an appeal should first be made to the directory or governing body, to redress the grievance. Failing there, in ordinary cases, the next redress will be found in the power of the ballot, which usually comes into exercise at short intervals.' We quoted approvingly the case of Greaves *v.* Gouge, 69 N. Y. 154, and Brewer *v.* Boston Theatre, 104 Mass. 378. In Hawes *v.* Oakland, 104 U. S. 450, Justice MILLER, in delivering the opinion of the court, stated that a stockholder could appeal to the courts for relief, 'when the board of directors or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders.' That is precisely what is averred in this case. 'But,' Justice MILLER adds, 'in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach, to obtain, within the corporation itself, the redress of his grievances, or action in conformity to

insolvency of a corporation refuses to sue, a stockholder may sue to enforce a claim of the corporation against its managing officer for diversion of funds. At the same time it has been held that a stockholder, seeking to enforce rights of the corporation against its managing officer for diversion of funds arising from an unauthorized "swapping" of checks, who, alleging that, being a director, he protested in writing against such acts when first apprised of them, but that they were nevertheless continued for two years, showed facts convicting himself of laches, by failing to aver that he was ignorant of such continuance.[1] A stockholder of a construction company which had constructed a railroad which became connected with and was controlled by another corporation, a railroad company, the latter assuming by contract the liabilities of the company absorbed by it to the construction company, brought his action as a stockholder of the latter against the construction company and the railroad company which had

his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains; and he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.' The principles commend themselves to our approval by the strongest of considerations. A corporation, to attain the highest success, should, like a family, dwell together in unity. And when disputes arise between members of this body politic, or law-created household, they should, if possible, be adjusted among themselves. It should be a strong case to justify a resort to personal litigation, which almost invariably leads to personal alienation if not open hostility. Pratt *v.* Jewett, 9 Gray, 34." As to actions against ministerial officers of a corporation for breaches of trust and misappropriation of funds, see Hyde Park Gas Co. *v.* Kerber, 5 Bradw. (Ill.) 132. As to what is required and what not required of stockholders before they can institute suits for mismanagement, etc., on the part of directors and officers, for the redress of grievances, see Bell *v.* Montgomery Light Co., (Ala.) 15 So. Rep. 569; McCrory *v.* Chambers, 48 Ill. App. 445; George *v.* Central R. R. & Bkg. Co. of Georgia, (Ala.) 14 So. Rep. 752; Earle *v.* Seattle, L. S. & E. Ry. Co., 56 Fed. Rep. 909; Sage *v.* Culver, 71 Hun, 42; s. c., 24 N. Y. Supp. 514; Putnam *v.* Ruch, 54 Fed. Rep. 216; Putnam *v.* Ruch, 56 Fed. Rep. 416; Atchison, T. & S. F. R. Co. *v.* Comrs., 51 Kans. 617; Eaton *v.* Robinson, (R. I.) 27 Atl. Rep. 595; Pondir *v.* New York, L. E. & W. R. Co., 72 Hun, 384; s. c., 25 N. Y. Supp. 560; 31 Abb. N. C. 29; Whitney *v.* Fairbanks, 54 Fed. Rep. 985; Fitzgerald *v.* Fitzgerald & Mallory Construction Co. et al., (1894) 41 Neb. 374; s. c., 59 N. W. Rep. 839.

[1] Streight *v.* Junk, (1893) 59 Fed. Rep. 321.

also, by purchase of the stock of the construction company, and electing so great a number of its directors, obtained full control of its management, charging great wrongs perpetrated on the part of the railroad company acting through its directors and management so as to create liabilities to the construction company growing out of their wrongdoing for which this action was brought to secure such equitable decree against the railroad company in favor of the construction company, its co-defendant, as would inure to the benefit of the complainant and others holding judgments and claims against the construction company. The Nebraska Supreme Court held that the action was maintainable.[1] Two receivers of this construction company had been appointed, it appeared in the petition in this case, one in a court of general jurisdiction in two different states. It was insisted upon the part of defendants that as this appeared the receivers were indispensable parties to the suit. But the court held to the contrary.[2] There was also a contention in this case, it being found by the court that this stockholder and one other representing one-fifth interest in the whole of the shares of the corporation, having acquiesced in these particular acts of the directors of the railroad corporation, the corporation itself was estopped from recovery. The court below found in accordance with this contention. The Supreme Court of Nebraska, however, held this finding of the court below to be erroneous. The position of the latter as to the law involved upon this point is thus stated in the syllabus by the court: The acquiescence of a stockholder will not preclude a recovery in an action brought by him in a proper case for the benefit of such corporation in respect of wrongs committed by the managing officers of said corporation against it for the benefit of another corporation in which they were also officers. In such case, while the stockholder is nominally the plaintiff, he is only nominally so; the action is in reality between the corporations joined as defendants — the one as the party wronged, the other as the party which profited by the wrong.[3] The corporation, a railroad company,

[1] Fitzgerald *v.* Fitzgerald & Mallory Construction Co. et al., (1894) 41 Neb. 374; s. c., 59 N. W. Rep. 839.

[2] Ibid.

[3] Ibid. *Arguendo*, it was said by the court: "It is difficult to conceive why the acquiescence of stockholders in the wrong found by the court, whereby its ability to pay its debts was greatly impaired, should preclude the right of the construction company to relief as against such wrong. The trial court found that, aside from the acquiescence of [the two stockholders],

one of the defendants in this case, was held liable civilly for the damages occasioned by the torts of its officers, its directors, to the construction company, its co-defendant, those torts being the result of the acts of those directors of the railroad company while acting in its interest in the management of the financial settlements based upon the contracts between the two on behalf of the construction company, which management the railroad company dominated.[1]

there had been the active commission of the wrong by the other four-fifths of the construction company's stock. Of what greater avail should be the mere acquiescence of the other fifth? In Quincy *v.* Steel, 120 U. S. 244; s. c., 7 Sup. Ct. Rep. 520, it was said that a suit brought by a stockholder for the benefit of the corporation was in fact a suit for the corporation itself. That the acquiescence of stockholders merely as such could be held to imply more than by an affirmative act such stockholder, as such, could perform, can scarcely be seriously argued. In the brief of the defendants is found the following quotation from the language of FIELD, J., in Humphreys *v.* McKissock, 140 U. S. 311, 312; s. c., 11 Sup. Ct. Rep. 779: 'The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation, the artificial being created, holds the property, and alone can mortgage or transfer it, and the corporation acts only through its officers, subject to the conditions prescribed by law.' In this brief it is also stated that Justice FIELD, in the case cited, approved the language of Chief Justice SHAW in Smith *v.* Hurd, 12 Met. (Mass.) 385, where he says: 'The individual members of a corporation, whether they should all join or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or choice in action, could not collect a debt or discharge a claim or release damages arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not any injury to them. Their rights and their powers are limited and well defined.' If all the stockholders, by joining in a power of attorney for that purpose, could not release damage arising from any default, upon what principle could such release be inferred from the mere acquiescence in such release by one-fifth in amount of the stockholders? Most manifestly such an anomaly cannot be tolerated, much less enforced, by judicial tribunals. In argument it is tenaciously contended, however, that the long acquiescence of the construction company effected the same result. There was no finding of such acquiescence by the court. Indeed, there could not be, consistently with the finding that the construction company was dominated in all things by the officers of the Missouri Pacific Railway Company [its co-defendant.]"

[1] Fitzgerald *v.* Fitzgerald & Mallory Construction Co. et al., (1894) 41 Neb. 374; s. c., 59 N. W. Rep. 839. It was

§ 213. Dissolution of a corporation by a scheme of a majority of stockholders and a sale of the property to themselves.— In a bill filed by a minority of stockholders of a corporation against the representatives of a majority of stockholders for an accounting as to the disposal of the property of the corporation to a new corporation formed by this majority of stockholders, the case disclosed therein was thus stated by WALLACE, J., of the United States Circuit Court: "A majority of the stockholders of a corporation resolve to avail themselves of their power as a quorum to sacrifice the interests of the minority

insisted that the acts of these directors were not imputable to the railroad company itself. This contention was disposed of by the Supreme Court of Nebraska in the following words: "The following apt language is employed by HARLAN, J., in the opinion of the Supreme Court of the United States in Railway Co. *v.* Harris, 122 U. S. on page 607; 7 Sup. Ct. Rep. 1286: 'In Railroad Co. *v.* Quigley, 21 How. 202, this court held that a railroad corporation was responsible for the publication by them of a libel in which the capacity and skill of a mechanic and builder of depots, bridges, station houses and other structures for railroad companies were falsely and maliciously disparaged and undervalued. The publication in that case consisted in the preservation in permanent form of a book for distribution among the persons belonging to the corporation, of a report made by a committee of the company's board of directors in relation to the administration and dealings of the plaintiff as a superintendent of the road. The court, under a full review of the authorities, held it to be the result of the cases that for acts done by the agents of a corporation, either *in contractu* or *in delicto,* in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. In State *v.* Morris & Essex R. R. Co., 23 N. J. Law. 369, it was well said that, if the corporation has itself no hands with which to strike, it may employ the hands of others, and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. The result of the modern cases is that a corporation is liable *civiliter* for torts committed by its agents or servants precisely as a natural person, and that it is liable as a natural person for the acts of agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizing the act. See, also, Salt Lake City *v.* Hollister, 118 U. S. 256, 260; s. c., 6 Sup. Ct. Rep. 1055; Steamboat Co. *v.* Brockett, 121 U. S. 637; s. c., 7 Sup. Ct. Rep. 1039; Bank *v.* Graham, 100 U. S. 699–702.' In Booth *v.* Bank, 50 N. Y. on page 400 *et seq.*, is found the following language: 'When an officer does an act which is within the general scope of his powers, although circumstances may exist which render the particular act a violation of his duty, the corporation is nevertheless bound by his acts as to persons dealing in ignorance of those circumstances, and is responsible to innocent third parties who have sustained dam-

stockholders for their own profit, by destroying the corporation and selling its property and franchises to themselves at half their real value. This scheme they have carried out, and now retain its fruits. They have thrust out the complainants, the minority, from their position as stockholders, terminating their relations with the corporation as such, and have deprived them from realizing what would belong to them upon a fair disposition and division of the corporate property." The court then discusses those acts and the powers of the majority and the rights of the minority of the stockholders, as follows: "It is to be observed that the

ages occasioned by such acts. And the liability of a corporation for the consequences of acts of its officers come within the scope of their general powers, and is not affected by the fact that the act which the officers have assumed to do is one which the corporation itself could not rightfully do. A corporation may do wrong through its agent as well as a private individual. Railroad Co. *v.* Schuyler, 34 N. Y. 30; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Bissell *v.* Railroad Co., 22 N. Y. 258; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309.' In Hussey *v.* King, (N. C.) 3 S. E. Rep. on page 926, DAVIS, J., delivering the opinion of the court, said: 'It was long thought that, as a corporation has no mouth with which to utter slander, or hand with which to write libels or commit batteries, or mind to suggest malicious prosecutions or other wrongs — as it was an artificial person and could speak and act only through the agency of others — it was not, therefore, liable for any torts except such as resulted from some act of commission or omission of its agents or servants while acting within the scope of granted powers, or wrongfully omitting and neglecting some duty imposed by its charter or by law; and, consequently, it was necessary to allege that the act committed was done while acting within the scope and power of the company, or that the act omitted was required to be performed. Whether it was wise to depart from this rule, that excepted corporations from liability for the acts of its agents in cases where the character of the act depended upon motives or intent, seems no longer an open question. The old idea, that because a corporation had no soul, it could not commit torts, or be the subject of punishment for tortious acts, may now be regarded as obsolete. The rights, the powers and the duties of corporate bodies have been so enlarged in modern times, and these artificial persons have become so numerous, and enter so largely into the every-day transactions of life, that it has become the policy of the law to subject them, so far as practicable, to the same civil liability for wrongful acts as attach to rational persons, and its liability is not restricted to acts committed within the scope of granted powers, but the corporation may be liable for an action for false imprisonment, malicious prosecution and libel. Pierce on Railroads, 273.' In Miller *v.* Railroad Co., 8 Neb. 219, it was said that a corporation is liable the same as a natural person for the tortious acts of its servants and agents in the course of their employment, but to make a corporation liable for such acts they must be connected with the transaction of the business for which the company was incorpo-

proceedings of the defendants were not outside of the charter or articles of association of the corporation, but, on the contrary, were carefully pursued according to the form of the organic law. They had a right to dissolve the corporation and dispose of its property and distribute the proceeds. The minority cannot be heard to complain of this, because the laws of Oregon permitted it and because it is an implied condition of the association of stockholders in a corporation that the majority shall have power to bind the whole body as to all transactions within the scope of the corporate powers.[1] Nor does it matter, in legal contemplation, that the majority were actuated by dishonorable or even corrupt motives, so long as their acts were legitimate. In equity, as at law, a fraudulent intent is not the subject of judicial cognizance unless accompanied by a wrongful act.[2] In other words, if the majority had the right to wind up the corporation at their election, and they availed themselves of it in the mode which was permitted by the organic law of the corporation, neither a court of law or equity can entertain an inquiry as to the motives which influenced them. The power to do this was undoubted." "But," the court said, "the right of the majority to sell the property to themselves at their own valuation is a very different matter; it cannot be implied from the contract of association, and will not be tolerated by a court of equity. As is said by MELLISH, L. J., in[3] [case cited below]: 'Although it may be quite true that the shareholders of a company may vote as they please and for the purpose of their own interests, yet the majority cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them.' If the majority sell the assets to themselves they must account for their fair value. They cannot bind the minority by fixing their own price upon the assets. A majority have no right to exercise the control over the corporate management which legitimately

rated, for the officers themselves are the mere agents of the corporation, and their powers are necessarily limited within the scope of the purposes of the corporation. The stockholders, however, by electing officers, assume the risk of the faithful or unfaithful management of the corporation, and cases may arise where, if one of two innocent persons has to suffer, the one who has created the power and selected the persons to enforce it must sustain the loss."

[1] Citing Durfee *v.* Old Colony & F. R. Co., 87 Mass. (5 Allen) 250; Bill *v.* Western Union Tel. Co., 16 Fed. Rep. 19.

[2] Citing Clarke *v.* White, 12 Pet. 178.

[3] Menier *v.* Hooper's Telegraph Works, L. R., 9 Ch. App. Cas. 350, 354.

belongs to them for the purpose of appropriating the corporate property or its avails to themselves, or to any of the shareholders, to the exclusion or prejudice of the others.[1] In[2] [case cited below], the property of a company was transferred to two shareholders in lieu of their shares, and the company was thereby practically put an end to, and the debts were thrown on the remaining shareholders. This was sanctioned by a majority of the shareholders at a general meeting, but it was held that the majority could not bind the minority in such a transaction, and it was set aside."[3]

§ 214. **The rights of the minority in such a case.**— The same judge, in the same court, in the same case, upon its second hearing, thus states the position and insistment of the defendants: "They have adjusted their own interests on the basis of a consolidation of the two corporations and a continuance of their business as a joint venture; but they now insist that the interests of the minority stockholders, who have not been permitted to participate with them, shall be adjusted on the basis of a dissolution and a cessation of the business which they originally associated together to conduct. More than this, the defendants insist that the value of the assets, for the purpose of determining the interests of the minority, is fixed by the appraisal of persons selected by the defendants themselves, in whose selection the minority had no voice; and they have assumed to deny all recognition to those of the minority who will not consent to surrender their stock and accept a final dividend upon the basis of this appraisal." He then continues the discussion: "Plainly, the defendants have assumed to exercise a power belonging to the majority in order to secure personal profit for themselves without regard to the interests of the minority. They repudiate the suggestion of fraud, and plant themselves upon their rights as a majority to control the corporate interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority. It cannot be denied that minority stockholders are

[1] Citing Brewer *v.* Boston Theatre, 104 Mass. 378, 395; Preston *v.* Grand Collier Dock Co., 11 Sim. 327; Hodgkinson *v.* National Live Stock Ins. Co., 26 Beav. 473; Atwool *v.* Merryweather, L. R., 5 Eq. 464, note.

[2] Gregory *v.* Patchett, 33 Beav. 595.

[3] Ervin *v.* Oregon Ry. & Nav. Co., (1884) 20 Fed. Rep. 577, 580.

bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to redress many forms of oppression practiced upon the minority under the guise of legal sanction which fall short of actual fraud. This is a consequence of the implied contract of association by which it is agreed in advance that a majority shall bind the whole body as to all transactions within the scope of the corporate powers. But it is also of the essence of the contract that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and that the majority shall not control those powers to pervert or destroy the original purposes of the corporations.[1] It is for this reason that the majority cannot consolidate the corporation with another corporation and impose responsibilities and hazards upon the minority not contemplated by the original enterprise, unless express statutory authority for this purpose is conferred upon the majority. It is no more repugnant to the purposes of the association to permit the majority to merge and consolidate the corporation with another corporation than it is to permit them to dissolve it or abandon the enterprise for which it is created, where no reasons of expediency require this to be done. A dissolution under such circumstances is an abuse of the powers delegated to the majority. It is no less a wrong because accomplished by the agency of legal forms. In the language of Blackburn, J., in[2] [case cited below]: 'As the shareholders are, in substance, partners in a trading corporation, the management of which is intrusted to the body corporate, a trust is, by implication, created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of carrying out the original speculation.' When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become, for all practical purposes, the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of

[1] Citing Livingston *v.* Lynch, 4 Johns. Ch. 573; Hutton v. Scarborough Cliff Co., 2 Drew. & S. 514; Brewer *v.* Boston Theatre, 104 Mass. 378; Kean *v.* Johnson, 9 N. J. Eq. 401; Rollins *v.* Clay, 33 Me. 132; Clinch *v.* Financial Corporation, 4 Ch. App. 117; Clearwater *v.* Meredith, 1 Wall. 25.

[2] Taylor *v.* Chichester Ry. Co., L. R., 2 Exch. 379.

legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que trust.*[1] When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself or to impair its value to the others. Community of interest involves mutual obligation. Persons occupying this relation towards each other are under no obligation to make the property or fund productive of the most that can be obtained from it for all who are interested in it; and those who seek to make a profit out of it, at the expense of those whose rights in it are the same as their own, are unfaithful to the relation they have assumed, and are guilty at least of constructive fraud." [2]

§ 215. **Principles applied to this particular case.**— Applying the principles as to the acts of fiduciaries with reference to the property intrusted to them, established in such cases as [those cited below][3] to the case in hand, Wallace, J., said: "* * * Although the minority of stockholders cannot complain merely because the majority have dissolved the corporation and sold its property, they may justly complain because the majority, while occupying a fiduciary relation towards the minority, have exercised their powers in a way to buy the property for themselves, and exclude the minority from a fair participation in the fruits of the sale. In the language of Mellish, L. J., in Menier *v.* Hooper's Telegraph Works, 9 Ch. App. Cas. 350, 354: 'The majority cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them.' The minority stockholders are, therefore, entitled to demand their fair share in the transaction, and to be placed upon terms of equality with the majority. It may be that

[1] Peabody *v.* Flint, 6 Allen, 52, 56; Hardy *v.* Metropolitan Land Co., L. R., 7 Ch. 427; Stevens *v.* Rutland R. Co., 29 Vt. 550.

[2] Ervin *v.* Oregon Ry. & Nav. Co., (1886) 27 Fed. Rep. 625; citing Jackson *v.* Ludeling, 21 Wall. 616, 622; Story Eq. § 323.

[3] Greenlaw *v.* King, 3 Beav. 49, 63; Gibson *v.* Jeyes, 6 Ves. 278; Torrey *v.* Bank of Orleans, 9 Paige, 663; Michoud *v.* Girod, 4 How. 555; Gardner *v.* Ogden, 22 N. Y. 327; and Hoyle *v.* Plattsburgh & M. R. Co., 54 N. Y. 315.

the property of the old company was not worth more than the sum fixed by the appraisers, estimating its value with a view of the winding up of the corporation; but for several months the property had been used by the defendants in a joint venture with the other property of the new corporation, and its value, at the time of the sale, should be estimated at what the property was worth as then situated. This results from the rule of equity which entitles those whose property has been misapplied by an agent or fiduciary to follow it into any form in which it has been converted, and impress it with a trust whenever its identity can be traced, or, at their election, to recover the value of the property in any form into which it has been transmuted. Story Eq. §§ 1261, 1262. If it was worth much more as a constituent of the new corporation than it would have been worth otherwise, the minority stockholders are entitled to the benefit of the increase. The majority of the stockholders are not to be permitted to segregate it from the conditions in which they have placed it, for the purpose of fixing its value to the minority. For this reason the estimate made by the appraisers is not controlling, even if it is of any value in determining the price for which the defendants should account. This is so, not only because the appraisers were the agents of those who were at the same time negotiating as the purchasers and the sellers of the property, but also because they adopted a basis of valuation which will not be sanctioned by a court of equity." [1]

§ 216. **When a fraudulent assignment of a mortgage by the treasurer of a corporation will bind it.**— In a case where it appeared that the treasurer of a savings bank, clothed with authority to do so, executed an assignment of a mortgage in the name of the bank in due form, and indorsed the note secured by it to a *bona fide* purchaser, it was held in the United States Circuit Court for the district of Massachusetts that the title passed, notwithstanding the treasurer perpetrated a fraud upon the bank, and converted to his own use the purchase money. It was further held that the corporation was estopped to prove, as against *bona fide* purchasers, either irregularity or fraud upon the part of its officers when acting within their authority.[2]

[1] Ervin *v.* Oregon Ry. & Nav. Co., (1886) 27 Fed. Rep. 625. A rehearing of this case was denied in 28 Fed. Rep. 833.

[2] Whiting *v.* Wellington, (1882) 10 Fed. Rep. 810. LOWELL, Circuit Judge, referring to a certificate of the treasurer given to the purchaser, that

§ 217. When a corporation may recover money fraudulently paid out by its treasurer.— Two manufacturing corporations of Massachusetts had a common treasurer. Money was loaned by one to the other when needed, and the loans were effected by the check of one payable to the order of the other drawn by the common treasurer. This treasurer had by a series of

a certain note was found upon the records of the corporation, said: "The estoppel arises from the certificate. * * * In a recent case in England a statute declared that, unless certain things were done, no shares of a joint-stock company should be issued except for cash, and all which should be issued otherwise should be subject to assessment. Shares were issued as 'paid up,' and were bought by a *bona fide* purchaser. The company and its liquidator were held estopped to prove that the statute had not been followed. In re British, etc., Co., 7 Ch. D. 533; s. c. *nom.* Burkinshaw *v.* Nicolls, 3 App. Cas. 1004. In that case (page 1026) a very able judge says that the doctrine of estoppel *in pais* is a most equitable doctrine, and one without which the law of the country could not be satisfactorily administered. 'When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is, I apprehend, what is meant by estoppel *in pais* or homologation.' This doctrine has been affirmed by the Supreme Court in a large class of cases where the facts are much more open to public observation than are the notes of a private corporation, in which counties and towns having power to issue bonds upon certain terms and conditions are held estopped to prove, as against *bona fide* purchasers, either irregularity or fraud on the part of their own officers in issuing the bonds, especially if they contain upon their face a certificate that the terms of the law have been complied with. These decisions do not depend upon the negotiable character of the bonds, excepting when there is a question of notice. Comrs. *v.* Aspinwall, 21 How. 539; Moran *v.* Comrs. of Miami, 2 Black, 722; Rogers *v.* Burlington, 3 Wall. 654; Grand Chute *v.* Winegar, 15 Wall. 355; Comrs. *v.* January, 94 U. S. 202; San Antonio *v.* Mehaffy, 96 U. S. 312; County of Warren *v.* Marcy, 97 U. S. 96. So, if a cashier has authority to certify a check, the bank is estopped to say that his authority is false in fact. Merchants' Bank *v.* State Bank, 10 Wall. 604. If a company has issued a certificate of shares, it is estopped to prove against one who has bought the shares in good faith, or even one who has paid one call or assessment to a third person on the strength of the certificate, that it was issued improvidently. In re Bahia, etc., Co., L. R., 3 Q. B. 584; Hart *v.* Frontino, etc., Co., L. R., 5 Exch. 111. Where the president, who was also transfer agent of a railroad company, issued an immense amount of false and fraudulent certificates of shares, beyond the whole capital, the company, after 'a decade of litigation,' was held bound to indemnify the honest purchasers. New York & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30."

embezzlements from the corporations created a deficit in their funds. He had concealed this deficit by at certain times drawing checks in the name of one corporation, payable to the order of the other, and placing it with the funds of the latter. When his embezzlements were discovered these fraudulently drawn checks were about equally divided between the corporations. There was an action for accounting brought by one against the other claiming a large balance in the mutual account. The defendant corporation pleaded as a set-off the amount of its funds received by the plaintiff through these fraudulent checks, and the plaintiff contended that the transfers of checks from one company to the other were, in fact and law, payments by the treasurer to an innocent creditor without notice, and, therefore, could not be reclaimed; that the losses must be borne as they stood at the time of the discovery of the frauds. The Supreme Court of Judicature held that the corporation using the money was affected with the knowledge of its treasurer and the transaction did not amount to a payment of the deficit, and that the other corporation was not guilty of such negligence as to preclude it from recovering back the money.[1]

[1] Atlantic Cotton Mills *v.* Indian Orchard Mills, (1888) 147 Mass. 268. C. Allen, J., speaking for the court said: "The ground on which the plaintiff asserts a right to retain the money is, that [its treasurer] had embezzled its funds, as well as the funds of the defendant, to a large amount, and that it is entitled to apply the money thus received from him to reduce his indebtedness for such embezzlements, and treat the same as a payment *pro tanto;* that from the nature of the transaction the law stamps it as a payment, and that thus the plaintiff is a holder of the funds for a valuable consideration. There is no doubt that a thief may use stolen money or stolen negotiable securities before their maturity, to pay his debts, and in such case an innocent creditor may retain the payment. But this doctrine is inapplicable to the present case for two reasons: In the first place, under the circumstances disclosed in the auditor's report, the plaintiff cannot be considered as an innocent creditor, that is, a creditor without notice, and, moreover, the transaction did not amount to payment. It is true that no officer of the plaintiff besides [its treasurer] knew of the fraudulent origin of these checks; but in the very transaction of receiving them, the plaintiff was represented by [him] and by him alone, and is bound by his knowledge. It is the same as if the plaintiff's directors had received the checks, knowing what he knew. For the purpose of accepting the checks, [he] stood in the place of the plaintiff, and was the plaintiff. It is quite immaterial, in reference to this question, in what manner or by what officer of the corporation the funds were received. The important consideration

§ 218. When a corporation must respond for damages resulting from a fraudulent issue of its stock.— One who was the secretary, treasurer and transfer agent of a domestic corporation, a street railroad company of the city of New York, and, as such secretary, kept and had in his custody the books of the corporation relating to the issue and transfer of stock, filled out a blank certificate taken from the company's certificate book, forged the name of its president thereto, signed his own name as treasurer, then countersigned it and impressed thereon the corporate seal. The by-laws of the corporation required that "all

is how the plaintiff became possessed of the money, and it is apparent that it was through the act of no other person than of [the treasurer] himself. It is not as if he had stolen the money, and then called the directors of the plaintiff corporation together and informed them of his indebtedness and of his desire to make a payment on account, and had then paid over to them the money as money coming from himself, and they had received it without knowledge or suspicion that it had been stolen, and given him credit for it as part payment. There was no transaction, whatever, between [the treasurer] and the plaintiff, in respect to the transfer of this money, in which the plaintiff was represented either in whole or in part by any other person than by [him], and, therefore, even though the transfer to the plaintiff had been made in bank bills or in gold coin (which it was not), the plaintiff must be deemed to have had knowledge of the true ownership, because in receiving the funds it acted solely through [his] agency. It must be deemed to have known what he knew, and it cannot retain the benefits of his acts, without accepting the consequences of his knowledge. The plaintiff cannot obtain greater rights from his act than if it did the thing itself, knowing what he knew. Such is the doctrine either expressly declared or necessarily involved in numerous adjudged cases. The leading case in this commonwealth is Atlantic Bank *v.* Merchants' Bank, 10 Gray, 532, where there was the semblance of an accounting between the guilty agent and other officers of the bank which received the money, but it was held that there was no real accounting and the general principle was held to be applicable. That case was followed by Skinner *v.* Merchants' Bank, 4 Allen, 290, where the facts were similar." After reviewing and citing many cases, it is further on in the opinion said: "We have preferred to put the decision of this point upon the broad ground that, if the treasurer of a corporation is a defaulter, and his defalcation is as yet unknown and unsuspected, and he steals money from a third person and places it with the funds of the corporation in order to conceal and make good his defalcation, and the corporation uses the money as its own, no other officer knowing any of the facts, the corporation does not thereby acquire a good title to the money, as against the true owner, but the latter may maintain an action against the corporation to recover back the same. But it is also apparent that in the present case the decision might rest upon a narrower ground. The fraudulent transfers were made by checks of the defendant, payable to the order of the plaintiff, and these checks before being available must

certificates shall be issued and signed by the president and treasurer and countersigned by the transfer agent." The certificate upon its face was perfect and regular in every respect, and showed a partner of the secretary and treasurer to be the owner of the shares of stock stated therein. The *in testimonium* clause recited that the corporation had caused the certificate to be signed by its president and countersigned by its treasurer and transfer agent, and sealed with its corporate seal. The partner of this officer of the corporation procured of a bank a loan upon his note secured by a pledge of the certificate. Before acting upon the applica-

necessarily have been indorsed by the plaintiff, acting by some officer authorized to indorse checks payable to its order. If these checks, therefore, were taken by the plaintiff in payment of indebtedness of [the treasurer] they carried notice upon their face that they were checks of the defendant, not payable to [his] order but to the order of the plaintiff. Now, assuming that [his] transaction had been conducted with some other officers of the plaintiff, who represented that corporation, it is impossible to suppose that they could have accepted these checks in extinguishment of a known indebtedness of [the treasurer] without being put upon inquiry as to how he came by the defendant's checks to so large an amount, made payable to the plaintiff, which he could apply upon his private account. National Bank of North America *v.* Bangs, 106 Mass. 441, 445." After commenting upon various cases cited by the plaintiff's counsel the discussion of this point closes with this: "Thus far the discussion has proceeded upon the assumption that even if the transfer of the defendant's property to the plaintiff were intended as a payment on account of [the treasurer's] indebtedness to the plaintiff, yet the plaintiff would not be entitled to hold the same on the ground that it would be chargeable with [his] knowledge of the source from which the money came. But it is equally clear that the transfer cannot be considered as a payment by [him] to the plaintiff, because it was not so understood. Nobody on the part of the plaintiff called [the treasurer] to any account, or knew that he was accounting or that he was indebted to the plaintiff, or that these funds had come into the plaintiff's possession or that they had come from [the treasurer]. Nobody but [he] could possibly have intended that the transaction should amount to a payment, and his intention, if entertained, was ineffectual because of his fraud. It is not necessary to deny or doubt that [he] might secretly transfer to the treasury of the corporation money or property of his own, and thus, if the same should be kept, extinguish an indebtedness arising from a former embezzlement. There would be nothing fraudulent in the act of such a transfer; and the corporation, being lawfully in possession of the money or property, might properly keep it. But where he undertook in this manner to make a payment by secretly transferring the property of a third person the act cannot take effect as a payment, because it was not received as such by any person acting in behalf of the plaintiff. There was not even the semblance of an accounting. And under these circumstances if the plaintiff would adopt the intention to make it a payment it must also adopt the fraud. It cannot adopt so much

tion for a loan the bank sent a clerk with the certificate to the office of the corporation, who showed it to the secretary, who was in charge of the office, who, in response to inquiries, stated that the certificate was genuine and all right, and that the applicant for the loan was a stockholder, and, relying thereon, the bank discounted the note. The bank afterwards was compelled to sell the certificate held as collateral to a *bona fide* purchaser, and when he presented it to the proper officers of the corporation for a transfer the corporation refused to recognize the certificate as valid evidence of title to the shares of stock stated therein. The bank upon this being brought to its knowledge, refunded the purchase money, and had the purchaser reassign the certificate to the bank, and brought its action against the corporation for damages incurred by its refusal to recognize the certificate, its right of recovery being based upon the corporation's liability on account of the fraud of its officer. The New York Court of Appeals declared these general rules, that where a certificate of stock contained apparently all the essentials of genuineness a *bona fide* holder thereof was entitled to recognition as a stockholder, if a new certificate could be issued to him, or to indemnity, if this could not be done; that the fact that an official signature to the certificate had been forged did not extinguish this right where the forgery had been done by, or at the instance of, an officer of the corporation intrusted with the custody of its stock books, and held out by the company as the source of information on that subject; that while certificates of stock in railroad and other business corporations do not possess in full the qualities of commercial paper, when the transfer indorsed thereon is signed in blank by the stockholder named therein, they become in effect, so far as the public is concerned, the same as if they had been issued to bearer.[1] It appeared in a

of [the treasurer's] act as was beneficial and reject the rest. As Lord KENYON said in Smith *v.* Hodson, 4 T. R. 211, it cannot blow hot and cold. This ground also is fully covered by the decisions in Atlantic Bank *v.* Merchants' Bank, 10 Gray, 532, 547–553, and in Skinner *v.* Merchants' Bank, 4 Allen, 290."

[1] Fifth Avenue Bank of New York *v.* Forty-second Street & Grand Street Ferry R. R. Co., (1893) 137 N. Y. 231; s. c., 33 N. E. Rep. 378, affirming judgment in favor of the bank. Referring to the ruling of the court that the corporation, in this case, was liable on account of the acts of its officer, the court, speaking through MAYNARD, J., said: "This result follows from the application of the fundamental rules which determine the obligations of a principal for the acts of its agent. They are embraced in the comprehensive statement of Story

New York case that the by-laws of the corporation required certificates of stock to be issued under the corporate seal and signed by the president and treasurer. The treasurer, upon the faith and pledge as collateral of spurious certificates of its stock, drawn up and executed in the form and manner prescribed by the by-laws (the signature of the president having been negligently affixed), purporting on their face to be of stock owned by the treasurer,

in his work on Agency (9th ed. § 452), that the principal is to be 'held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances, or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat superior*, and is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.' It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarily within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his rights to act depended. It was a certificate apparently made in the course of his employment, as the agent of the company, and within the scope of the general authority conferred upon him, and the [corporation] is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them. Griswold *v.* Haven, 25 N. Y. 599; New York & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30; Titus *v.* G. W. Turnpike Co., 61 N. Y. 237; Bank of Batavia *v.* New York, L. E. & W. R. R. Co., 106 N. Y. 199." It was said further in this opinion: "The learned counsel for the defendant seeks to distinguish this case from the authorities cited, because the signature of the president to the certificate was not genuine; but we cannot see how the forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer and transfer agent. They were officers to whom it had intrusted the authority to make the final declaration as to the validity of the shares of stock it might issue, and where their acts, in the apparent exercise of this power, are accompanied with all the indicia of genuineness, it is essential to the public welfare that the principal should be responsible to all persons who receive the certificates in good faith and for a valuable consideration and in the ordinary course of business whether the indicia are true or not. 2 Beach on Pr. Corp.

obtained a loan of one acting in good faith and in ignorance of the fraud. The Court of Appeals held that there was nothing upon the face of the certificate to notify the lender of any defect in the title of the treasurer to these shares, and that the corporation was liable to him for the damages.[1]

§ 219. The same subject — Massachusetts decisions.— Several cases have been adjudicated by the Supreme Court of Judicature of Massachusetts, growing out of the fraudulent transactions of a treasurer of a railroad corporation of that state. The facts were that he was supplied by the president with blank certificates of its stock, signed by the president. The treasurer was also a stockbroker. In this latter capacity he told a customer on one occasion, that he had purchased shares of this stock for her as ordered, and she paid him for it. On another occasion he ordered certain brokers to sell shares of the stock for him, and they did so, and received payment for it. He owned no stock, and held none as agent or otherwise, and the whole amount of the capital stock had already been issued. In each case he fraudulently made a fictitious transfer of stock on the books of the corporation, in one case from himself as agent to his customer, and in the other from himself as agent to the brokers, and by means of a blank power of attorney furnished by the brokers and delivered to him, made a further transfer as their attorney to their customers. He then filled out blank certificates of the shares in the usual form under the corporate seal, and delivered

790; North River Bank *v.* Aymar, 3 Hill, 262; Jarvis *v.* Manhattan Beach Co., 53 Hun, 362; Tome *v.* Parkersburg Branch, 39 Md. 36; Baltimore, etc., R. R. Co. *v.* Wilkens, 44 Md. 11, 28; Western M. R. Co. *v.* Franklin Bank, 60 Md. 36; Com. *v.* Bank, 137 Mass. 431; Holden *v.* Phelps, 141 Mass. 456; Manhattan Beach Co. *v.* Harned, 27 Fed. Rep. 486; Shaw *v.* Port Philip & Colonial Gold Mining Co., 13 Q. B. Div. 103. The rule is, we think, correctly stated in Beach on Private Corporations (Vol. 2, § 488, p. 791): 'When certificates of stock contain apparently all the essentials of genuineness, a *bona fide* holder thereof has a claim to recognition as a stockholder, if such stock can be legally issued, or to indemnity if this cannot be done. The fact of forgery does not extinguish his right when it has been perpetrated by or at the instance of an officer placed in authority by the corporation and intrusted with the custody of its stock books and held out by the company as the source of information upon the subject.'"

[1] Titus *v.* President, etc., Great Western Turnpike Road, (1876) 61 N. Y. 237. Claflin *v.* Farmers & Citizens' Bank, 25 N. Y. 293, was distinguished by the Court of Appeals.

them to the purchasers, each of whom received dividends regularly until the fraud was discovered, after which the corporation refused to recognize the certificates as valid, or to allow a transfer of the stock. The purchasers and the brokers acted in good faith, and the brokers acted according to the general custom of brokers. The treasurer had made nearly all the transfers on the books of the corporation as attorney under like powers; and it was not the custom of brokers to take transfers of certificates to themselves when ordered to sell stocks. The court upon these agreed facts held that the plaintiffs were entitled to damages from the company, as the company could issue no more stock, and the measure of the damages was the market value of the shares at the time the corporation first refused to recognize the certificates as valid.[1]

[1] Allen *v.* South Boston Railroad Co., (1889) 150 Mass. 200; Craft *v.* South Boston Railroad Co., (1889) 150 Mass. 200. "The agreed facts in both cases," said FIELD, J., speaking for the court, "show gross carelessness on the part of the president in signing certificates in blank, and negligence on the part of the directors in not examining the books and discovering the fictitious transfers of stock made by the treasurer." Then, as to the admissions on the part of the defendant, it is said: "The counsel for the defendant does not deny that if these certificates of stock had been sold and duly assigned by the plaintiffs for value to one who had no knowledge that they had been fraudulently issued, the defendant would be liable in damages to the purchaser. He admits the general rule that a corporation is estopped to deny the validity of certificates issued in proper form under its seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value without knowledge or notice that they had been fraudulently issued." Moores *v.* Citizens' National Bank, 111 U. S. 156; Boston & Albany Railroad *v.* Richardson, 135 Mass. 473; Machinists' National Bank v. Field, 126 Mass. 345; Pratt v. Taunton Copper Manuf. Co., 123 Mass. 110; New York & New Haven Railroad *v.* Schuyler, 34 N. Y. 30, 64; Titus *v.* Great Western Turnpike Road, 61 N. Y. 237, 245; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Shaw *v.* Port Philip Mining Co., 13 Q. B. D. 103. Of the contention on behalf of the corporation, it is said: "But he contends that the plaintiffs were negligent in accepting the new certificates without taking pains to ascertain whether old certificates of a corresponding number of shares had been surrendered, and a transfer made upon the books of the company. Each certificate of stock in the defendant's company, as the plaintiff knew, declared that the shares are 'transferable by an assignment in the books of said company upon a surrender of this certificate. When a transfer shall be made in the books of the company, and this certificate surrendered, a new one will be issued.' See Pub. Sts. Mass. chap. 113, § 13. The contention is, that one object of this provision was the protection of the corporation against the frauds of its officers in issuing false certificates, and that if the plaintiffs in these cases had re-

§ 220. The same subject — a Pennsylvania decision.— A president of a corporation having fraudulently issued false certificates of stock of the corporation, properly signed and sealed, in excess of the amount authorized by law, a Court of

quired that a certificate of shares be delivered to them with an assignment of it, or a power of attorney to assign it, [the treasurer] could not have committed these frauds." The court said to this: "We do not see why [the treasurer], having been intrusted with blank certificates signed by the president, might not have issued certificates to himself, and then assigned them when the stock was sold, and on the surrender of the old certificates have issued new certificates. Perhaps the chances of detection would have been slightly greater if he had proceeded in this way. But certainly this provision regulating the transfer of stock, if intended as a protection to the corporation against the frauds of its offieers, is insufficient. The primary purpose of it undoubtedly was to prescribe the manner in which such intangible property as shares of stock should be transferred from one person to another, and it required the transfer to be made on the books of the company that the company might know who its stockholders were, and it required the surrender of the old certificate before the new one was issued, that there might not be two or more certificates outstanding for the same shares of stock. The ground on which a corporation is held liable to a *bona fide* purchaser for value of false certificates of its stock issued under its seal, signed by the proper officers, and apparently genuine, is that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchaser. It is the duty of the proper officer of the corporation to ascertain that its stock has been transferred in accordance with its by-laws and in accordance with law, before they issue a new certificate. The transfer, which must be made on the books of the company, must be made by the owner of the old certificate, or by his attorney for him. The surrender of the old certificate must be made by him or his attorney. There is no provision that it shall be made by the purchaser, as the assignee of the attorney of the seller. If the seller undertakes with the purchaser to make the surrender and the transfer on the books of the company, the only thing left for the purchaser to do is to call upon the corporation for the new certificate. We see no good reason for holding that there is a duty on the part of the purchaser towards the corporation, to see to it that the seller of stock surrenders his certificate and transfers it on the books of the corporation. That is the duty of the corporation towards both the seller and the purchaser before it issues a new certificate. If the purchaser exhibits to the corporation a forged assignment of stock or a forged power of attorney to assign it, and thus obtains a new certificate, which he sells, he is liable to the corporation, not because it is his duty to attend to the transfer of stock, but because he has impliedly represented the forged signature to be the genuine signature of a stockholder, whereby he has deceived the corporation. Boston & Albany Railroad *v.* Richardson, 135 Mass. 473. Before the passage of the statute of 1884, chapter 229, if not since, the transfer of stock was usually attended to by brokers, if the stock was bought and sold through brokers. Many shares

Common Pleas of Pennsylvania held that *bona fide* purchasers of such stock were entitled to relief against the corporation which could not gainsay its own certificates. They held further that the measure of damages in such a case would be the market value

of stock represented by a single certificate were often sold in parcels to many different persons, and the seller made but one surrender, with powers of attorney to transfer the parcels to the different purchasers. A purchaser of stock violated no duty to the corporation when he trusted to the seller to make the assignment and the surrender of the old certificate. The utmost that can reasonably be contended is that the fact that a certificate was not exhibited and delivered with a power of attorney to the purchaser, was a circumstance to be considered upon the question whether the purchaser acted in good faith and with due care." The court then, in detail, states the facts attending the purchase and transfer of shares through the brokers, and said: "On these facts, we think it clear that [this plaintiff] exercised due care in obtaining a transfer of the stock, and that [the treasurer] in making the transfer was not his agent, but the agent of [the broker selling it], or the undisclosed principal. In issuing the new certificate he was the agent of the defendant, and as the plaintiff cannot now be put *in statu quo*, the defendant must bear the loss." Of the second case, it was said: "The plaintiff received from [the treasurer], as broker, a certificate, in her name, of the stock which he said he had bought for her, and there is nothing to show that this was not the usual way in which brokers transacted such business. Apparently [she] acted as a purchaser, though a broker usually acted, and we see no want of due care on her part." They then refer to a question in her case: "Another question arises in her case from the fact that [the treasurer], who committed the fraud upon the defendant, was, also, her agent in the transaction. If he be regarded as acting in two capacities, and as having committed the fraud in his capacity as treasurer, he yet, as her agent, knew of and participated in it. Is this knowledge to be imputed to her in determining her rights against the defendant? The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. Suit *v.* Woodhall, 113 Mass. 391; National Security Bank *v.* Cushman, 121 Mass. 490; Sartwell *v.* North, 144 Mass. 188; The Distilled Spirits, 11 Wall. 356. There is an exception to this rule, when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and, therefore, knowledge of it, as matter of law, cannot be imputed to the prin-

of the stock at the date of a demand by the holders for a transfer, or, if no demand were made, at the date of filing the bills; and, where specific performance was impossible, a pecuniary equivalent might be awarded.[1]

cipal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established. Kennedy *v.* Green, 3 Myl. & K. 699; Espin *v.* Pemberton, 3 De G. & J. 547; Rolland *v.* Hart, L. R., 6 Ch. 678; In re European Bank, L. R., 5 Ch. 358; Cave *v.* Cave, 15 Ch. D. 639; Kettlewell *v.* Watson, 21 Ch. D. 685, 707; Innerarity *v.* Merchants' National Bank, 139 Mass. 332; Dillaway *v.* Butler, 135 Mass. 479; Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268; Howe *v.* Newmarch, 12 Allen, 49. The case [of Craft *v.* South Boston R. R. Co.] seems to me to fall within this exception. Although the fraudulent act of [the treasurer] may not have been committed with the intention of cheating the plaintiff, yet that was its legal effect, and it was a fraudulent act committed by him for his own benefit, the actual effect of which would have been wholly to avoid the transaction if the plaintiff had known of it. The present cases we think fall within the principle that where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit fraud."

[1] Willis *v.* Philadelphia & Darby R. R. Co., (Pa. 1878) 6 W. N. C. 461. The court said: "It is well settled that one who, as a purchaser or lender, gives value on the faith of a certificate of stock, authenticated by the seal of the corporation and the signatures of the proper officers, acquires an equitable title, and may require the corporation to transfer the stock to him or respond in damages for the default. It is not a sufficient answer to such a demand that the certificate was fraudulently issued, because corporations are, not less than natural persons, answerable for the conduct of their agents in the business intrusted to their care. Nor is it necessarily conclusive against such a purchaser that the party from whom he bought was cognizant of, or participated in, the fraud. If a certificate of stock is not a negotiable instrument, it is a written declaration that the holder has a definite share in the capital or profits of the concern, which, though delivered to him, is intended for circulation and virtually addressed to all the world, and third persons who are misled by such an instrument may justly require that the loss shall fall on the corporation and not on them. New York & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30, 52, 80; Bank of Kentucky *v.* Schuylkill Bank, 1 Parsons' Eq. 180; In re Bahia & San Francisco R. R. Co., L. R., 3 Q. B. 595. * * *" The defendants answered that, however sound the argument might be under other circumstances, it was inapplicable here, because the railway company was limited by its charter to ten thousand shares. When that number was reached the power was exhausted, and any subsequent proceedings under it merely void. The barrier thus set was insuperable, and could not have been surmounted by a vote of the directors or stockholders, or by both conjoined. To hold that the president and treas-

§ 221. When a corporation may not respond for damages for fraudulent issue of stock.— The officer of a corporation in a New York case obtained certain certificates of stock of a corporation, which had been signed by a former president of the corporation in blank, and left with the other then officers

urer could, by a fraudulent and unauthorized overissue, bind the company to that which the company was powerless to perform, was to hold that an agent might acquire a power through fraud which the principal did not possess and could not have conferred. The court said: "This argument might be unanswerable if the power to give certificates was identical with the power to create stock, or if a certificate could not legitimately be issued to any one who claimed under a derivative title, because it would then be incumbent on third persons to take notice of the limited nature of the power and ascertain whether it had been strictly pursued. It is, however, plain that the legislature did not intend to impose a rule contrary to the ordinary course of business, and which would have enhanced the market value of the stock. Although the company could not issue a larger number of shares than that prescribed by its charter, it might well give a new certificate to a purchaser in lieu of that surrendered by the vendor, and repeat the act as often as the occason required. This was virtually conceded during the argument, but it was at the same time strenuously urged that, to render such a substitution valid, the pre-existing certificate must be given up as other stock duly transferred on the corporate books. If this method was observed the public and stockholders would be safe, and a departure from it involved an excess of power which rendered the transaction void, not only between the original parties, but as it regarded purchasers claiming under them. The cogency of this reasoning should not render us unmindful of a consideration by which it is controlled. That which a corporation is not authorized to do under any circumstances, or which is absolutely forbidden by its charter, is so entirely void that nothing short of an act of assembly can render it valid, but that which it may do for certain purposes and not for others, or on the happening of a particular event, is not necessarily within this rule, and may take effect although the prerequisites were not fulfilled. N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30, 68. The case in hand apparently belongs to the latter category. We have seen that although the railway company could not create new stock, it might properly give a certificate to a purchaser as evidence that he had acquired a title regularly deduced on the books, and the legal, as well as the natural, presumption in every such case is that the power has been exercised for a legitimate end, and not in a way to render it invalid. N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30, 63. 'Acts of corporations,' says Judge KING in Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. 252, 'which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter. In short, the acts of artificial persons afford the same presumptions as the acts of natural persons. Each afford presumptions, from acts done, of what preceded. A vote of a corporation may be presumed from other acts, though there is no proof of such vote on the corporate records. * * * The source from which these prin-

to be used in case a stockholder desired to transfer his stock in the president's absence. He filled out the blanks in one of these certificates, inserting his own name as stockholder, forging the name of one who was the treasurer of the corporation when the president signed them, and signed his own name as transfer agent, which position he occupied at that date, and dating the transaction to make it conform to the date when the president's signature was affixed. When he did this he was president of the company. He used the false certificate of stock by pledging it as a collateral security for a loan made to him personally. In an action by the holder of this certificate against the corporation for damages, by reason of his fraud, the New York Court of Appeals held that there could be no recovery.[1]

ciples have been drawn is the judgment of Justice STORY in The Bank *v.* Dandridge, 12 Wheat. 64.' This citation would seem to be a conclusive answer to the argument that the production of a certificate of stock is not *prima facie* evidence of a title, and that a purchaser must examine the records of the corporation and ascertain from them whether the vendor has the right which the certificate avers. Such an investigation is absolutely superfluous where the officers of the corporation have done their duty, and will generally be unavailing when they are engaged in the perpetration of a fraud. N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30, 71. It is no doubt true, as the counsel for the defense contend, that the formal mode of deducing title to stock is by a transfer regularly made in some book kept for the purpose by the corporation or its duly constituted agents. But although a certificate of stock is not the title, it is an authoritative declaration that such a title exists, which may operate as an equitable estoppel in favor of third persons who part with value in the belief that it is true. The legal title does not pass to the purchaser, but he acquires an equitable right, and may insist that the corporation shall transfer the stock, or, if unable to do so in consequence of an obstacle which cannot be removed, give an equivalent for that which is withheld. N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, 80, 83."

[1] Manhattan Life Insurance Co. *v.* Forty-second Street & Grand Street Ferry R. R. Co., (1893) 139 N. Y. 146; s. c., 34 N. E. Rep. 776. This opinion was rendered by MAYNARD, J., who said. "The rule which imposes a liability upon the principal for the unauthorized acts of his agent, is founded upon public policy, and is well defined. It is limited to cases where there was an apparent authority to do the act in question; and it appeared to have been done in the course of his employment as agent and was within the scope of his general powers. None of these grounds of liability have been shown here. The agency did not exist in 1888, which was necessary in order to deprive the principal of the right to disclaim responsibility for the unauthorized act. With respect to the creation of certificates bearing date in 1881, he was as destitute of authority as if he had been a stranger to the corporation. He not only could not issue them, but

§ **222. Massachusetts decisions on this subject.**— In a case in Massachusetts it appeared that the treasurer of a railroad corporation had for a private debt placed fraudulently issued stock with his creditor as security in the creditor's name and the creditor had afterwards used it as a collateral himself for a loan, but upon payment of his loan it was reassigned to him. The court held to this effect: That if an officer of a corporation having the

he could take no part in their issue, or do any act required by law, or by the by-laws, essential to give them validity. When he issued such a certificate in his own name, he was not apparently acting within the scope of any general authority conferred upon him by the corporation. The defendant cannot justly be held liable for the misuse of a power which it never created. This case has no feature in common with the Fifth Avenue Bank against the same defendant, 137 N. Y. 231. There [this officer], at a time when he was treasurer and transfer agent, and invested with authority in both capacities to sign, countersign and seal valid certificates of stock, forged the name of the president to a certificate and issued it to a confederate, who negotiated a loan upon it at the bank, which, before receiving it, caused inquiry to be made at the office of the defendant, and was informed that the certificate was genuine. [He] was there acting within the scope of his apparent authority, and whether the certificate had been actually signed by the president and was issued in the regular course of the administration of the affairs of the company, were facts peculiarly within his knowledge, and the countersigning and issue of the certificate in due form was a representation by him that these conditions had been complied with, and that the facts existed, upon which his right to act depended. Here there was a total lack of delegated power to [him] to do a single lawful act in the issue of the certificate in the form in which it was presented to the plaintiff. There was no negligent or wrongful use by him of any authority derived from the [corporation]. It was a willful and criminal act, perpetrated for private gain and not connected with the exercise of any official authority or semblance of authority which he possessed as the [corporation's] agent. The plaintiff insists that there is another ground upon which a recovery is permissible. When [this officer] made the loan and pledged the forged certificate, he represented to the plaintiff that it was a genuine certificate of the stock of the corporation; and as he was then its president and chief administrative officer, the claim is made that the [corporation] is bound by his representations. * * * [This officer], when he negotiated the loan, was not engaged in the transaction of the [corporation's] business, or in the discharge of any duty imposed upon him by the [corporation]. The declarations of an agent are only admissible against his principal when made as a part of a transaction undertaken in behalf of his principal, or in the performance of the duties of his agency. First Nat. Bk. of Lyons *v.* Ocean Nat. Bk., 60 N. Y. 278. Or, as is sometimes stated, the representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his

power, either alone or with others, to issue certificates of stock, fraudulently issues as security for his private debt a certificate to his creditor in the latter's name, such creditor cannot rely upon the certificate and recover damages from the corporation upon its refusal to recognize it as valid, although he has no knowledge of the fraud; but if upon taking it he fails to investigate the title to the stock he is affected with notice of whatever he might have discovered upon making proper inquiry.[1]

agency, which is but another form of expressing the same proposition. N. Y. Life Ins. Co. *v.* Beebe, 7 N. Y. 364. But, without determining what are the duties of the officers of a corporation, when called upon to respond to the inquiries of intending purchasers of the stock, there is a sufficient reason why the plaintiff cannot avail himself of the representations of [this officer] in regard to the genuineness of this certificate. They were made in a private and personal transaction, undertaken for his individual benefit and so understood by the plaintiff. The plaintiff knew that [this officer], in the negotiation of the loan, was not acting as the officer or agent of the [corporation], or in its behalf, and that his personal interest in the transaction might lead him to betray his principal. It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest." See, also, Stone *v.* Hayes, 3 Denio, 575; Bentley *v.* Columbia Ins. Co., 17 N. Y. 423; Claflin *v.* Farmers & Citizens' Bank, 25 N. Y. 293; Wilson *v.* M. E. R. Co., 120 N. Y. 145; Moores *v.* Citizens' Nat. Bank, 111 U. S. 156; Farrington *v.* South Boston R. R. Co., 150 Mass. 406.

[1] Farrington *v.* South Boston Railroad Company, (1890) 150 Mass. 406. *Arguendo*, it was said: "The present case cannot be distinguished in principle from Moores *v.* Citizens' National Bank, 111 U. S. 156. In that case Mr. Justice BRADLEY dissented, and the decision has been the subject of some criticism. Lowell Transfer of Stock, § 112, note 2. The ground of that decision as stated in the opinion is as follows: The plaintiff 'having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock without taking any steps to assure herself that the legal prerequisites to the validity of her certificate which were to be fulfilled by the former owner and not by the bank had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity.' Upon a review of the authorities in the opinion it is said: 'This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrendered former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate

These facts appear in another Massachusetts case. The by-laws of a corporation provided that "each stockholder shall be entitled to a certificate of his stock under the seal of the corporation and signed by its president and treasurer." The president had no authority to issue certificates of stock. He had access to the stock book and issued to certain parties certificates of shares of the corporation, signed by himself, and forged the signature of the

delivered to her by its cashier.' In that case the president of the bank had left blank certificates of stock signed by him with the cashier, as in the present case the president of the railroad company had left similar blank certificates with the treasurer. At the trial of that case in the United States Circuit Court a verdict was directed for the defendant on the ground that the plaintiff having had knowledge of the fact that Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier — that is, acting for the bank upon one side and for himself on the other in reference to the matter of issuing this certificate — she is not, in the judgment of this court, an innocent holder of the stock. Moores *v.* Citizens' National Bank, 15 Fed. Rep. 141." The Massachusetts Supreme Court resumed: "We have decided in Allen *v.* South Boston Railroad Co., 150 Mass. 200, 204, that a purchaser of stock owes no positive duty to the corporation to see to it that the seller surrenders the old certificate and makes an assignment of the stock on the books of the company, but that it is the duty of the corporation which requires these things to be done to see that they are done before a new certificate is issued to the purchaser. The plaintiff, in the case at bar, knew that he was dealing with the treasurer of the defendant in his personal capacity as a borrower of money. If the by-laws of the company had provided that certificates of stock should be signed only by the treasurer, and if he were charged with the duty of attending to the transfer of stock and the issuing of certificates, any person lending money to him for his private use and taking in his own name a certificate of the company's stock as collateral security, could reasonably be required to investigate the title of the treasurer to the certificate delivered, because in issuing such a certificate the treasurer would have a personal interest adverse to that of the corporation. An agent cannot properly act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by his principal. The difficulty in the present case is that these considerations are only partially applicable to it. It is on account of the danger that one officer may abuse his power to issue stock certificates that the by-laws of corporations usually require the certificates to be signed by at least two officers of the corporation. If one of these neglects his duty or delegates the performance of it to the other, the safeguard intended by this requirement of the by-law becomes ineffectual, and if one of these officers in issuing a stock certificate has a personal interest adverse to that of the corporation, a person dealing with him and knowing this may well be required

treasurer to the same. The holders of these certificates sought by action to hold the corporation responsible for these spurious certificates of stock, contending that the corporation was bound to make the certificates good, or was responsible for their being bad, on the ground that, in view of his previous known misconduct, the corporation was negligent in permitting its president to remain in that official position, and to have control of its certificate book and seal, and that the cases fall within the principle that, where one of two innocent persons must suffer a loss for the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud. The Supreme Court of Judicature of that state held that the corporation was not liable for the acts of its president in issuing these certificates.[1]

to take notice that the rights of the corporation are not protected in the transaction to the full extent intended by the by-laws."

[1] Hill *v.* C. F. Jewett Publishing Co., (1891) 154 Mass. 172; s. c., 28 N. E. Rep. 142. ALLEN, J., said: "In the absence of any previous misconduct on [the president's part], it could hardly be maintained that there was any negligence on the part of the corporation in keeping its seal and book of certificates of shares where the president could have access to them, so as to be able to remove blank certificates from the end of the book and impress the corporate seal upon them. We are not aware that it is customary for corporations in this country to keep their seals or books of certificates in such a way that access can only be had to them when two or more officers are present. The chief safeguard in respect to the certificates is the necessity of two signatures. And, accordingly, when one who has had confidence reposed in him has availed himself of his opportunity to commit a fraud upon others by means of forgery, it has usually been held in England that the loss was not a natural or probable result of the confidence thus imposed, even though it showed carelessness, and that it was too remote to be properly chargeable upon those who were thus careless in reposing the confidence. Bank of Ireland *v.* Evans' Charities, 5 H. L. Cas. 389; Mayor etc., of Staple of England *v.* Governor etc., of Bank of England, 21 Q. B. D. 160, 176; Swan *v.* North British Australasian Co., 2 H. & C. 175, 189. See, also, Vagliano *v.* Bank of England, 22 Q. B. D. 103, 117; s. c., on appeal, 23 Q. B. D. 243, 255, 263. The plaintiffs rely much on Shaw *v.* Port Philip & Colonial Gold Mining Co., 13 Q. B. D. 103, which in many of its general features much resembles the present case, but with certain differences. In that case the secretary of the defendant company issued a certificate of shares, with the name of a director forged by himself. The person to whom it was issued bought shares on the market, through a broker, who received a transfer signed by the secretary, accompanied by what purported and in all respects appeared to be a regularly issued certificate of those shares. These were deposited at the company's office, with the request for the issue of a new certificate, in the usual way. The new certificate was issued in the usual form by the secretary, but the signature of a director, which

was required, was forged. It was a part of the regular and authorized duty of the secretary to receive and examine transfers and certificates of shares, to have transfers registered, to procure the preparation, execution and signature of certificates with all requisite and prescribed penalties, and thereupon to issue them to the persons entitled to receive them. Moreover, the company, after the issue of the certificate, paid a dividend thereon, by check signed by the secretary and two directors. The decision of the case, which was not heard before the Court of Appeal, was placed on the ground that the company had made it the duty of the secretary to procure the preparation, execution and signature of certificates with the prescribed penalties, and thereupon to issue them to the person entitled to receive them. The principal facts upon which the decision turned are wanting in the case before us. The president of the defendant corporation was not the proper officer to issue certificates, and the certificates which the plaintiff received did not come from the office of the defendant in the regular course of business, but they were received by the plaintiffs under private and personal transactions between themselves and Jewett, the president."

CHAPTER VI.

PERSONAL LIABILITY OF OFFICERS.

§ 223. **Directors' liability — general rules.**— Whether directors of a corporation are to be regarded as its agents or its elements, impartial justice and public policy require that as all nat-

ural persons are, so they should be held responsible to third persons for the malfeasance by them in fact committed or commanded.[1] Directors or officers of a corporation acting beyond their power, whereby loss inures to the corporation, or disposing of its property, or paying away its money without authority, will be required to make good the loss out of their private estates.[2] But they are not liable, in the absence of fraud or intentional breach of trust, for negligence, mistakes of judgment and bad management in making investments on doubtful or insufficient security. Where they have not profited personally by bad management or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence.[3] The directors of a corporation, as trustees of its shareholders, are liable for all losses caused by their willful failure to exercise the care and attention to the affairs of the corporation which would prevent a misappropriation of the trust or corporate funds.[4] But directors and officers of a company will not be held personally liable to its creditors on the ground that they have mismanaged its business and contracted an indebtedness in excess of the limit prescribed in its charter, unless they are made liable by the provisions of the charter or some general statute regulating such corporations. And it would make no difference that the credit be extended in reliance upon the business character and financial responsibility of the directors and officers.[5] If directors of a cor-

[1] Rule declared in Salmon *v.* Richardson, (1862) 30 Conn. 360, 374, in which case the directors of an insurance company who had fraudulently permitted false statements to be officially made by the president and secretary of the company, as to its assets and condition, which induced a person to insure in the company when the company was utterly insolvent, and after his loss he could recover nothing from the company, were held not to be saved from personal liability for the injury by reason of the fact that they were acting officially.

[2] Joint-Stock Discount Co. *v.* Brown, L. R., 8 Eq. 381; Flitcroft's Case, L. R., 21 Ch. Div. 519; Franklin Ins. Co. *v.* Jenkins, 3 Wend. 130.

[3] Briggs *v.* Spaulding, 141 U. S. 130; Spering's Appeal, 71 Pa. St. 11; Citizens' B. L. & S. Association *v.* Coriell, 34 N. J. Eq. 383, 392; Swentzel *v.* Penn. Bank, (1891) 147 Pa. St. 140; s. c., 23 Atl. Rep. 413; In re Forest of Dean Coal Mining Co., L. R., 10 Ch. Div. 450; Ackerman *v.* Halsey, 37 N. J. Eq. 363; Hun *v.* Cary, 82 N. Y. 65; In re Denham & Co., L. R., 25 Ch. Div. 752; Watts' Appeal, 78 Pa. St. 391. Liability of directors for acts *ultra vires* discussed, and decisions showing the current of authority in England on the subject reviewed, 34 Solic. J. 503.

[4] Lewis *v.* St. Albans Iron & Steel Works, 50 Vt. 477.

[5] Frost Manufacturing Co. *v.* Foster, (1889) 76 Iowa, 535; s. c., 41 N. W. Rep. 212. That directors are not re-

poration are guilty of gross negligence and inattention to the duties of their trust, they will be personally liable if they suffer the corporate funds or property to be wasted or lost by reason of such negligence and inattention.[1] The care and diligence required of directors in the discharge of their duties as such, must be determined in each case in view of all the circumstances.[2] The directors of a corporation in whom its constitution reposes an enlarged discretion in the management of its business, are responsible to its stockholders only for good faith and reasonable diligence; a mere error of judgment on their part in compromising a debt due to the corporation, would not entitle a stockholder to relief against the directors in equity.[3] The directors of a manufacturing corporation have no authority to divert the corporate property by issuing accommodation paper, or otherwise loaning its money or credit without consideration.[4] And where officers of such a corporation accept accommodation paper in the name of the corporation, they will be held personally responsible to it for payments made or liabilities incurred in consequence of such acceptance on their part in its behalf.[5] A board of directors, in carrying out the vote of the required majority of the board, directing a total cessation of the business of the corporation and a liquidation of its affairs, would be acting within the sphere of its lawful authority and would not be held liable for any loss occurring to the minority from the step they had taken in carrying out

lieved from liability by the fact that they act gratuitously in that capacity, see Donaldson *v.* Haldane, 7 Cl. & Fin. 771; Thorne *v.* Deas, 4 Johns. 84, 96, 97; Charitable Corporation *v.* Sutton, 2 Atk. 405; Litchfield *v.* White, 3 Sandf. 551; Spering's Appeal, 71 Pa. St. 11, 21; Giblin *v.* McMullen, L. R., 2 Privy Council Cas. 318, 337; First Nat. Bank *v.* Ocean Bank, 60 N. Y. 295; Grill *v.* S. C. Co., L. R., 1 C. P. 612; Beal *v.* R. R. Co., 3 Hurlst. & Colt. 341; Nolton *v.* R. R. Co., 15 N. Y. 444; Wilson *v.* Brett, 11 Mees. & W. 113, 115.

[1] Horn Silver Mining Co. *v.* Ryan, (1889) 42 Minn. 196; s. c., 44 N. W. Rep. 56. See, also, Brinkerhoff *v.* Bostwick, 88 N. Y. 52.

[2] Horn Silver Mining Co. *v.* Ryan, (1889) 42 Minn. 196; s. c., 44 N. W. Rep. 56.

[3] Smith *v.* Prattville Manufg. Co., (1857) 29 Ala. 503; citing Angell & Ames on Corp. §§ 312–314; Robinson *v.* Smith, 3 Paige, 222; Forbes *v.* Whitlock, 3 Edw. Ch. 446; Bushwick, etc., Turnpike Co. *v.* Ebbetts, 3 Edw. Ch. 353; Van Cortlandt *v.* Underhill, 17 Johns. 405; Dodge *v.* Woolsey, 18 How. 331; Godbold *v.* Branch Bank at Mobile, 11 Ala. 191; Mozley *v.* Alston, 1 Phil. Ch. 790; Ware *v.* Grand Junction Water Works Co., 2 Russ. & Myl. 470.

[4] Hutchinson *v.* Sutton Manufacturing Co., (1893) 57 Fed. Rep. 998.

[5] Ibid.

the vote of the majority.[1] An action against directors of a corporation for misfeasance or culpable negligence in the discharge of their official duty, may be in form legal or equitable according to the circumstances of the particular case. The proper plaintiff in such a case is the corporation.[2] The complaint in such a case need not negative knowledge of, or acquiescence on the part of the stockholders in the negligence or misconduct of the directors.[3] Where directors waste or misappropriate the funds, or convert assets of the corporation in violation of their trust, or lose them in speculations, a recovery at law may be had against the defaulting directors, while a suit in equity might also be maintained for an accounting, at the election of the corporation.[4] The directors of a corporation which has purchased the franchises and property of another corporation under an agreement that its debts would be paid, misapplying the assets of the latter, and leaving its debts unpaid, will be held individually responsible to the creditors of that corporation to the extent of the assets received and misapplied.[5] Directors of a life insurance company who had transferred its entire stock and assets to another in which its policyholders reinsured their risks, which transaction resulted in great loss to policyholders and creditors of the company, have been held liable to the receiver of the company to the full extent of the damage caused by such misapplication and waste of the company's funds. And the fact that these directors carried out

[1] Trisconi *v.* Winship, (1890) 43 La. Ann. 45; s. c., 9 So. Rep. 29. In Baily, Receiver, *v.* Burgess, (1891) 48 N. J. Eq. 411; s. c., 22 Atl. Rep. 733, a director of a corporation who was appointed as agent to secure a plant of another corporation for its use, and to remove incumbrances from it, and furnished a sum of money for the purpose, was held to account to the receiver of the corporation for the amount not expended by him as well as interest on various sums of money which he could have applied to the removal of incumbrances upon the property, but negligently delayed doing so with the funds in his hands.

[2] Horn Silver Mining Co. *v.* Ryan, (1889) 42 Minn. 196; s. c., 44 N. W. Rep. 56

[3] Ibid. See Rolseth *v.* Smith, 38 Minn. 14; s. c., 35 N. W. Rep. 565.

[4] Franklin Fire Ins. Co. *v.* Jenkins, 3 Wend. 130; Robinson *v.* Smith, 3 Paige, 222.

[5] National Bank of Jefferson *v.* Texas Investment Co. (Lim.), (1889) 74 Tex. 421; s. c., 12 S. W. Rep. 101. In Holt *v.* Bennett, (1888) 146 Mass. 437; s. c., 16 N. E. Rep. 5, it was held that payments made by a corporation intending in good faith to go on and develop valuable patents owned by it, to its directors of money borrowed from them in the ordinary course of business, were not recoverable from such directors by a creditor of the corporation whose debt at the time was not due and payable.

the transactions under the advice of able and experienced counsel was held not to relieve them from their liability; nor did the action of the policyholders in reinsuring their risks in the other company to which the assets were transferred, and receiving, by order of court, dividends upon their policies from the assets of this company, amount to a ratification of the illegal transactions of the directors so as to preclude them or a receiver of the company from maintaining an action against the directors for their misconduct in the matter.[1]

§ 224. **Liability of other officers — general rules.**— The officers of a corporation are not liable personally, at common law, on a promissory note of the corporation, made by them as such officers, in which the promise to pay is made by the corporation, and not by the officers personally.[2] If any personal liability exists against officers of a corporation who have executed a note binding the corporation by its terms, and not themselves personally, and the contract is made without authority, and the corporation cannot be holden responsible on the contract, the liability results from the wrong done by the officers in undertaking to act without authority.[3] When a corporation has in fact no authority to contract debts, a contract of a debt upon its supposed credit by its officers would impose a personal liability upon them.[4] One, a director, vice-president and general foreman of a corporation, who signed the name of the corporation to an agreement to contribute to the expenses of a suit at law, without informing the other parties of his want of authority to do so, thus giving them to understand that the corporation was interested, was held by the Michigan Supreme Court liable to contribute the share of the expenses otherwise chargeable to the corporation.[5] The president of a cor-

[1] Pierson *v.* Cronk, (Sup. Ct. N. Y. Spl. Term, 1890) 26 Abb. N. C. 25; s. c., 13 N. Y. Supp. 845.

[2] Hall *v.* Crandall, (1866) 29 Cal. 567. See, also, Blanchard *v.* Kaull, (1872) 44 Cal. 440; Lander *v.* Castro, 43 Cal. 497.

[3] Hall *v.* Crandall, (1866) 29 Cal. 567.

[4] Drake *v.* Flewellen, 33 Ala. 106; Harwood *v.* Humes, 9 Ala. 659.

[5] Solomon *v.* Penoyar, (1891) 89 Mich. 11; s. c., 50 N. W. Rep. 644. In Vincent *v.* Chapman, 10 G. & J. (Md.) 282, the Maryland Court of Appeals held that there could be imposed no personal responsibility upon the members of the vestry of a church by proceedings as vestrymen pledging the corporate funds to persons who might perform work for it, which the vestry then thought adequate, if the funds should prove to be merely nominal and inadequate; further, that their subsequently manifesting an impression that

poration may be held individually liable on an implied warranty of his authority where he executes a written guaranty in the name of the corporation without authority.[1] The president of a corporation would not make himself personally liable to a stockholder by a promise upon his transferring the stock he owned to him, that when the corporation was wound up the stockholder should receive the proportion of the proceeds to which he would be entitled.[2] An officer of a corporation, in an action against him to recover moneys wrongfully retained by him belonging to the corporation, cannot defend on the ground that the receipt of such moneys by the corporation was for work or business illegal or *ultra vires* the powers of the corporation, or that its charter was fraudulently obtained and the election of its officers illegal.[3] The president of a bank has been held chargeable with constructive notice of the management of its affairs by the cashier and other subordinate officers; and where the bank was doing business without legal organization he could not escape the responsibility resulting from such notice by showing that he supposed himself the president of a legally constituted bank, if he had contributed the influence of his reputation to give undeserved credit to a spurious corporation.[4] The liability of an ostensible president of a spurious bank, in a depositor's suit for damages, is direct and original, and he will be held responsible in damages to the same extent as the bank, if legally constituted, would have been liable.[5] In a Wisconsin case, seeking to charge certain officers of a corporation individually for negligence in the conduct of its affairs, it appeared that these officers, president, secretary and treasurer, who had been intrusted with the management by the directors, who held no meetings and gave no attention to their duties, had conducted the affairs of the corporation in good faith, though negligently and in the exercise of powers belonging solely to the board of directors. The Supreme Court held that these officers could not be charged as *ex officio* members of the board

they had assumed a personal responsibility, without an act to fix the liability, could not vary the interpretation of the instrument nor entitle the pledgers to a recovery upon a claim not otherwise well founded.

[1] Nelligan *v.* Campbell, (1893) 65 Hun, 622; s. c., 20 N. Y. Supp. 234.

[2] Thompson *v.* Stanley, (1893) 20 N. Y. Supp. 317.

[3] Haacke *v.* Knights of Liberty Social & Literary Club, (1892), 76 Md. 429; s. c., 25 Atl. Rep. 422.

[4] Hauser *v.* Tate, (1881) 85 N. C. 81.

[5] Ibid.

of directors, and that neither of them was liable for the negligence or unauthorized acts of the others in which he did not participate.[1] The court also ruled upon some questions of evidence in such a case as follows: That mere proof of failure to collect certain moneys due to the corporation was not proof that such moneys were lost; also, that in respect to losses alleged to have been sustained because of insufficient payments to the corporation on certain accounts, a report of the secretary was not competent evidence against the president and treasurer to charge them with such losses or to show that no more was paid to him than he reported.[2] A corporation obligating itself to aid another in its enterprise, and placing funds in the hands of its treasurer for the purpose of meeting the obligation, cannot hold him liable for the funds where he has expended them in the interest of the other corporation and this expenditure has been assented to by resolution of the corporation's board of directors entered in the records

[1] North Hudson Mutual Building & Loan Association *v.* Childs, (1892) 82 Wis. 460; s. c., 52 N. W. Rep. 600. The Wisconsin Supreme Court declared the rules as to liability of officers in these words: "The liability of officers to the corporation for damages caused by neglect or unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority, or neglects his duty to the damage of his principal. It seems to be now universally agreed that, no matter whether the act is prohibited by the charter or by-laws, the liability is on the ground of violation of authority or neglect of duty. Thomp. Liab. Off. Corp. 357; Briggs *v.* Spaulding, 141 U. S. 146. There can be no doubt that if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they will be required to make good the loss out of their private estates. Thomp. Liab. Off. Corp. 375; Joint-Stock Discount Co. v. Brown, L. R., 8 Eq. 381; Flitcroft's Case, L. R., 21 Ch. Div. 519; Franklin Ins. Co. v. Jenkins, 3 Wend. 130. * * * This is the rule where the disposition made of money or property of the corporation is one either not within the lawful power of the corporation, or, if within the power of the corporation, is not within the power or authority of the particular officer or officers. Where the ground of liability is for nonfeasance, negligence or misjudgment in respect to matters within the scope of the proper powers of the officer, he will be held responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case and the usages of business."

[2] North Hudson Mutual Building & Loan Association *v.* Childs, (1892) 82 Wis. 460; s. c., 52 N. W. Rep. 600.

of the corporation.[1] The treasurer of a railroad corporation gave a bond to the corporation, conditioned that he should "faithfully discharge the duties of the office, and well and correctly behave therein." The Supreme Court of North Carolina held, in an action against him and his sureties on this bond, that the bond did not bind him to keep the money of the corporation safely against all hazards; that it only bound him to an honest, diligent and competently skillful effort to keep the money. The treasurer having deposited the money of the corporation to his credit as treasurer in a banking house, at the time in good standing and credit, and considered by the community a safe place of deposit for money, the treasurer and his sureties were held not to be liable for its loss by the sudden and unexpected failure of the banking house.[2] An action of contract by the corporation against a person to whom the treasurer of the corporation has, without authority, loaned to that person, thus misappropriating its funds, will not be held such a ratification of the treasurer's act as will relieve him from liability to the corporation.[3] It appeared also in this case that in the action brought against the borrower of its funds from its treasurer the corporation attached personal property of the borrower, a manufacturing corporation, of an uncertain value; that a mortgagee duly notified the officer that he claimed the attached property under a mortgage; that a receiver of the corporation appointed in New Jersey, where it was incorporated, offered to pay the plaintiff, in settlement of the suit, almost fifty per cent of its claim; that the plaintiff notified its treasurer and the sureties on the treasurer's bond of this offer, and offered to permit him, upon paying the amount due the plaintiff, to assume the control of the suit, and to assign to him its cause of action. The treasurer declined this proposition and the plaintiff made a compromise with the borrower of its funds through

[1] Bay View Homestead Assn. *v.* Williams, (1875) 50 Cal. 353.

[2] Atlantic & North Carolina R. R. Co. *v.* Cowles, (1873) 69 N. C. 59. That the rule does not apply to public officers or officers of public corporations, the same court has held in Comrs., etc., *v.* Clarke, 73 N. C. 255; Havens *v.* Lathene, 75 N. C. 505.

[3] Goodyear Dental Vulcanite Co. *v.* Caduc, (1887) 144 Mass. 85; s. c., 10 N. E. Rep. 483. The court said: "To hold that bringing a suit under such circumstances not only ratifies the loan, so far as the borrower is concerned, but condones the offense of the agent and relieves him from all liability, would be carrying the doctrine

the receiver, and gave a release reserving to itself its rights against the treasurer. The court held that this compromise, under the facts stated, did not release the treasurer from his liability to the corporation for misappropriation of its funds.[1]

§ 225. Rules as to liability of officers for diversion of property of corporation.— The New Jersey Court of Errors and Appeals has declared the following rules as to the liability of directors who have diverted the property of the corporation, and the principles upon which they are founded. Referring first to the change of legislation in that state repealing the "act to prevent frauds by incorporated companies," MAGIE, J., said: "But in my judgment the change in legislation has not deprived creditors of incorporated companies of all rights in respect to the property out of which their debts must be paid, if at all. As between creditors and stockholders, the corporate property has always been held to be a fund for the payment of debts, to which creditors have a right in preference to stockholders. 2 Story's Eq. Juris. § 1252. So the assets of a corporation cannot be divided among its stockholders, nor diverted to uses not contemplated by its charter, for the benefit of stockholders to the detriment of creditors. Nat. Trust Co. *v.* Miller, 6 Stew. Eq. 155; Guild *v.* Parker, 14 Vr. 430. Nor can directors, by fictitious credits, or by accepting overvalued property in payment for stock subscriptions, deprive creditors of the fund out of which their debts should be paid. Wetherbee *v.* Baker, 8 Stew. Eq. 501. These doctrines do not at all depend, as I conceive, on the existence of a corporation bankrupt law, or other like legislation, nor on the prohibitions of the statutes respecting transactions in fraud of creditors, but rather on principles inherent in the nature of corporations as to artificial persons whose creditors can only enforce their debts by a resort to the property the corporation has acquired. So, upon like principles, I apprehend that the property of an incorporated company is devoted to the payment

of implied ratification to an unreasonable and unjust extent."

[1] Goodyear Dental Vulcanite Co. *v.* Caduc, (1887) 144 Mass. 85; s. c., 10 N. E. Rep. 483. As to the personal liability of an agent representing a foreign corporation in Pennsylvania, where the corporation has not qualified itself to do business in that state upon contracts made on behalf of that corporation, see Lasher *v.* Stimson, (1892) 145 Pa. St. 30; s. c., 23 Atl. Rep. 552; 29 W. N. C. (Pa.) 404.

of the creditors thereof, at least to this extent, that it may not be diverted to other purposes. The corporation and its officers owe to their creditors this duty, not to divert the corporate property from the general purpose of paying the creditors. While they may dispose of the corporate property, and even prefer one creditor to another, they may neither give away the corporate property by a direct gift, nor by sale at less than its full and fair value, to the detriment of creditors. A violation of this duty will entitle the creditors who suffer thereby to relief. If the diversion of the corporate property from the payment of debts is effected by a mere gift, it is not necessary to discuss what relief could be afforded to creditors. If the diversion is effected under the guise of a sale, and the sale is not objectionable, as being made with intent to defraud creditors, then it is plain that relief cannot be afforded to creditors by setting aside the sale, for that, as we have seen, is not now prohibited. But, in such a case, it is equally plain that the directors who have effected such a diversion of corporate property from the payment of debts, have violated a duty, and will be personally liable to make up to creditors what has, by their acts, been thus diverted. When such diversion is charged to have been produced by a sale of corporate property to a stranger, the complaining creditors could obtain relief only by clear proof that by the fault of the directors, and in violation of their duty, the sale was made for less than the full and fair value of the property. But when directors make sale of corporate property to one of their number, who takes part in the transaction, as both buyer and seller, and creditors are thereby deprived of the opportunity to enforce their debts, then it results from the relation above mentioned as existing between them and the creditors; that it devolves on the directors to show that the transaction was made in good faith, and that the sale produced the full value of the property. If they fail to show these facts, creditors are entitled to compel them to account for the full value of the property. The fact that by reason of the sale it has been rendered difficult to determine the real value of the property sold, will not alter the measure of the directors' liability. If there is a conflict of evidence respecting value, the fact that by the act of one of the parties, the determination of the question has been rendered difficult or, impossible, may be considered, but it cannot enlarge the liability of the directors, which is only for so much

as has been lost to the creditors by their misconduct.[1] In an action by a receiver of an insolvent Illinois corporation against its directors to recover misappropriated moneys of the corporation, the Supreme Court of that state has held that if the directors of an incorporated company apply the funds of the corporation to the discharge of their own indebtedness, or wrongfully pay an outgoing president a salary for past services not agreed to be paid until after their performance, they will be liable to the creditors of the company for the amount of the funds thus misapplied. It was also held that where a president of an incorporated company performs services as such, without any by-law or resolution providing compensation for his services, and afterwards accepts a salary voted to him for past services, he will be liable to refund the same in favor of creditors of the company.[2] The court further held, in this case, that the Statute of Limitations was no bar to a recovery, by the receiver of the insolvent corporation, from the directors, of the sums of money misappropriated by them.[3]

[1] Wilkinson *v.* Bauerle, (1886) 41 N. J. Eq. 635, 645, 646, in which the principles of the text were applied to the case before the court. See, also, on this subject, Dodd *v.* Wilkinson, (1886) 41 N. J. Eq. 566.

[2] Ellis *v.* Ward, (1890) 137 Ill. 509. The court said, upon this last point: "The doctrine is well settled in this court that the law will not imply a promise, on the part of a private corporation, to pay its officers for the performance of their usual duties. In order that such officers may legally demand and recover for such services, or the corporation legally make all awards and payment therefor, it must appear that a by-law or resolution has been adopted, authorizing and fixing such allowance before the services were rendered. American Central Ry. Co. *v.* Miles, 52 Ill. 174; Merrick *v.* Peru Coal. Co., 61 Ill. 472; Rockford, Rock Island & St. Louis Railroad Co. *v.* Sage, 65 Ill. 328; Cheeney *v.* La Fayette, Bloomington & Mississippi Ry. Co., 68 Ill. 570; 87 Ill. 446; Holder *v.* La Fayette, Bloomington & Mississippi Ry. Co., 71 Ill. 106; Gridley *v.* La Fayette, Bloomington & Mississippi Ry. Co., 71 Ill. 200; Illinois Linen Co. *v.* Hough, 91 Ill. 63. The rule is analogous to that governing trustees generally, who, at common law, were not entitled to compensation, except as there was warrant therefor in the contract or statute under which they acted."

[3] Ellis *v.* Ward, (1890) 137 Ill. 509. In this connection, it was said: "It is a principle of general application, and recognized by this court, that the assets of a corporation are, in equity, a trust fund (St. Louis & Sandoval Coal & Mining Co. *v.* Sandoval Coal & Mining Co., 116 Ill. 170), and that the directors of a corporation are trustees, and have no power or right to use or appropriate the funds of the corporation, their *cestui que trust*, to themselves, or to waste, destroy, give away, or misapply them. Holder *v.* La Fayette, Bloomington & Mississippi Ry. Co., 71 Ill. 106; Cheeney *v.* La Fayette, Bloomington & Mississippi Ry. Co., 68 Ill. 570; 1 Morawetz on

§ 226. Liability of officers arising from manner of execution of commercial paper.— In a case before the Appellate Court of Illinois the note sued on was subscribed by the defendants with the affix to one signature "Pres.," to the other "Sec.," and below the signatures "Salem Coal and Mining Co." They specially pleaded that the note was the note of the coal and mining company. It was held by the court that the fact that the note was signed by defendants as officers of a corporation, and the name of the corporation attached, did not release them from individual liability, in the absence of evidence that they were officers, and that the note was intended as the note of the corporation only.[1] In a case before the Minnesota Supreme Court, the note given to the plaintiff was signed by the defendant with the affix "Pres." to his signature. Its defense was that he was the president of a certain "club," a corporation organized under the laws of that state, and that he made the contract for articles for that club and gave this note for it. The Supreme Court held that where defendant undertook to overcome the plaintiff's *prima facie* case by testimony tending to show that the notes were executed by him in behalf and as the act of a corporation of which he was

Private Corpor. §§ 516, 517. And it is equally well settled that no lapse of time is a bar to a direct or express trust as between the trustee and *cestui que trust*. Chicago & Eastern Illinois Railroad Co. *v.* Hay, 119 Ill. 493; Wood on Limitation of Actions, § 200, and cases cited in note. If the trust assumed by the directors of a corporation in respect of the corporate property under their control, is to be regarded as a direct trust, as contradistinguished from simply an implied trust, then it is apparent, under the rule announced, the statute presents no bar to this proceeding by the receiver of the corporation. Ordinarily, an express trust is created by a deed or will, but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable, and such appears to be the relation established by law between directors and the corporation. 2 Pomeroy's Eq. § 6; Id. §§ 1088–1090, 1094. And see, also, as respects stockholders, Hightower *v.* Thornton, 8 Ga. 486; Payne *v.* Bullard, 23 Miss. 88; Curry *v.* Woodward, 53 Ala. 371."

[1] Williams *v.* Miami Powder Co., (1890) 36 Ill. App. 107. The court said: "The absence of all evidence on these questions renders it necessary to construe these notes according to the face of the notes, and in doing so the records 'Pres.' and 'Secy.' are to be regarded as *descriptionæ personæ* merely. They must be held according to their contract." Citing Hypes *v.* Griffin, Admr., etc., 89 Ill. 134; Stobie *v.* Dills, 62 Ill. 432; Bickford *v.* First Nat. Bank of Chicago, 42 Ill. 238; Trustees of Schools *v.* Rautenberg, 88 Ill. 219; Powers *v.* Briggs, 79 Ill. 493; Scanlan *v.* Keith, 102 Ill. 634.

president, and for its debt, and that this was well known and understood by the payee of the notes, to sustain the defense he should have gone further, and shown that not only the debt was one which the corporation had the power to incur, but that the corporation authorized it to be incurred.[1] Where in a negotiable

[2] Brunswick-Balke Collender Co. *v.* Boutell, (1890) 45 Minn. 21; s. c., 47 N. W. Rep. 261. The court said: "It is well settled in this court that when such a word as 'agent' or 'trustee,' which may be descriptive of the person, or may be descriptive of the character in which the signer contracts, is affixed to the name of the party entering into a contract, it is *prima facie* descriptive only, and that it may be shown by extrinsic evidence that the attached word was understood by all interested as determining the character in which the person using it contracted. Pratt *v.* Beaupre, 13 Minn. 187, 189; Bingham *v.* Stewart, 14 Minn. 153, 214; Deering *v.* Thom, 29 Minn. 120; s. c., 12 N. W. Rep. 350; Peterson *v.* Homan, 44 Minn. 166; s. c., 46 N. W. Rep. 303. In the earlier of these cases, where the words 'Agents Steamer Flora,' had been affixed to the defendants' signatures to a shipping contract, it was also settled that where a party seeks to change the *prima facie* character of the contract on the ground of agency, it is incumbent upon him to prove the fact of the agency. To establish that he acted in a representative capacity he must first show the existence of the capacity. If he assumes to act as an agent he must prove his authority to do so, or his liability upon the contract is necessarily of a personal character." In Frankland *v.* Johnson, (1893) 147 Ill. 520, an action was brought upon a note which was in these words: "On or before, etc., the Western Seamen's Friend Society agrees to pay or order the sum of * * * with interest, etc., [signed] [defendant's name] general superintendent," against the signer individually. The Supreme Court of Illinois said of this writing: "[It] is not distinctly the note of [defendant]. A personal note by him, in proper form, would have used the personal pronoun 'I' instead of the name of the corporation, and would have been signed without the description 'Gen. Supt.' Neither is it by its terms the note of a corporation. As such it should have been signed with the name of the corporation by its president, secretary or other officers authorized to execute it, or, as in Scanlan *v.* Keith, 102 Ill. 634, by the proper officers designating themselves officers of the corporation for which they assumed to act, or, as in Newmarket Savings Bank *v.* Gillet, 100 Ill. 254, using the corporate name both in the body of the note and in the signatures to it. But if it be conceded that, *prima facie,* a general superintendent of a corporation has authority to make promissory notes in its name, and this instrument be held to appear on its face to be the obligation of the society, rather than of [defendant], certainly it could not even then be contended that it was conclusively so. It is well understood that if the agent, either of a corporation or an individual, makes a contract which he has no authority to make, he binds himself personally according to the terms of the contract. Angell & Ames on Corp. § 303. It was said by SUTHERLAND, J., in Mott *v.* Hicks, 1 Cow. 513. s. c., 13 Am. Dec. 556: 'It is perfectly well settled that if a person undertake to contract, as agent, for an individual or corporation, and contracts in a manner which is not legally binding upon

promissory note, given for the debt of a corporation, the language of the promise does not disclose the corporate obligation, and the signatures to it are in the names of individuals who were in fact officers of the corporation, a *bona fide* holder, without notice of the circumstances of its making, is entitled to hold it as the personal undertaking of its signers, although they have affixed to their names the titles of their respective offices, as this will be regarded as descriptive of the persons and not of the character of the liability.[1]

his principal, he is personally responsible (citing authorities). And the agent, when sued upon such a contract, can exonerate himself from personal liability only by showing his authority to bind those for whom he has undertaken to act. It is not for the plaintiff to show that he had not authority. The defendant must show affirmatively that he had.' This rule is quoted with approval in Wheeler *v.* Reed, 36 Ill. 91." They then considering it a question of fact which had been properly referred to the jury, and the latter, upon what the court deemed the strength of the testimony, having determined adversely to the defendant, held their conclusion not subject to review. As to such notes being *prima facie* the personal notes of the signers, see McNeil *v.* Shober & Carqueville Lithographing Co., (1893) 144 Ill. 238; Sturdivant *v.* Hull, 59 Me. 172; Tucker Manuf. Co. *v.* Fairbanks, 98 Mass. 101; Savage *v.* Rix, 9 N. H. 263; Bank *v.* Hooper, 5 Gray, 567; Trustees *v.* Rautenberg, 88 Ill. 219; Powers *v.* Briggs, 79 Ill. 493; Stobie *v.* Dills, 62 Ill. 433; Fiske *v.* Eldridge, 12 Gray, 474; Seaver *v.* Coburn, 10 Cush. 324. As to the admissibility of parol evidence in such cases to show whose note it was, see La Salle National Bank *v.* Tolu Rock & Rye Co., 14 Ill. App. 141; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Baldwin *v.* Bank of Newbury, 1 Wall. 234; Brockway *v.* Allen, 17 Wend. 40; Kean *v.* Davis, 21 N. J. L. 683; Haile *v.* Peirce, 32 Md. 327; Richmond R. Co. *v.* Snead, 19 Gratt. 354; Lazarus *v.* Shearer, 2 Ala. 718; Owings *v.* Grubbs' Admr., 6 J. J. Marsh. 31; McClellan *v.* Reynolds, 49 Mo. 312; Hardy *v.* Pilcher, 57 Miss. 118; Hager *v.* Rice, 4 Col. 90; Magill *v.* Hinsdale, 6 Conn. 464; Mann *v.* Chandler, 9 Mass. 335; Neill *v.* Spencer, 5 Ill. App. 473; Western Union *v.* Smith, 75 Ill. 496; Bowles *v.* Lambert, 54 Ill. 237; Stookey *v.* Hughes, 18 Ill. 55; Scanlan *v.* Keith, 102 Ill. 634.

[1] Casco National Bank of Portland *v.* Clark, (1893) 139 N. Y. 307; s. c., 34 N. E. Rep. 908. In this case the note sued on, given for the debt of the corporation, was written on a blank having printed on its margin the name of the corporation. No reference to the corporation was made in the body of the note, which read: "We promise to pay." It was signed by the president of the corporation in his individual name, with "Prest." written after, and in the same manner by its treasurer, with "Treas." added to his signature. The note was discounted by the bank for the payee before maturity. The New York Court of Appeals held that an action against the signers individually was maintainable; that the appearance in print upon the margin of the name of the corporation was not a fact carrying any presumption that the note was, or was intended to be, the note of the company; that it was competent for the officers to obligate themselves per-

§ 227. Liability of officers arising from indorsement of commercial paper.— A promissory note executed by a corporation, the name of which was subscribed to the note and those of the president and secretary attached, and the names of its directors indorsed upon the back of it, designating themselves as

sonally, and apparently they did so by the language of the note. The court said: "This must be regarded as the long and well-settled rule. Byles on Bills, §§ 36, 37, 71; Pentz *v.* Stanton, 10 Wend. 271; Taft *v.* Brewster, 9 Johns. 334; Hills *v.* Bannister, 8 Cow. 31; Moss *v.* Livingston, 4 N. Y. 208; De Witt *v.* Walton, 9 N. Y. 571; Bottomley *v.* Fisher, 1 Hurlst. & Colt. 211. It is founded on the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if its purpose is equivocal, the obligation is that of its apparent makers. It was said in Briggs *v.* Partridge, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances, as in the case of Mott *v.* Hicks, 1 Cow. 513, where the note read, 'the president and directors promise to pay,' and was subscribed by the defendant as 'president.' The court held that that was sufficient to distinguish the case from Taft *v.* Brewster, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation. In the case of Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312, referred to by the appellant's counsel, the action was against the defendant to hold it as the indorser of a bill of exchange, drawn to the order of 'S. B. Stokes, Cas.,' and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill, by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff as well as apparent. Incidentally, it was said that the same strictness is not required in the execution of commercial paper as between banks; that is, in other respects, between individuals. In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of the obligation, the established rule must be regarded to be that it is the agreement of its ostensible maker and not of some other party, neither disclosed by the language nor in the manner of execution." To obviate the effect of this rule, the appellant in this case proved that one, a director of the cor-

"board of directors," was the cause of action in a Kansas case. The lower court refused any evidence as to the circumstances under which the names of the directors were indorsed upon the note, and they were held bound as guarantors of the note of the corporation. The Supreme Court held that as between the origi-

poration, the payee company, was also a director in the plaintiff bank at the time when the note was discounted, and it was argued that the knowledge chargeable to him as director of the former company was imputable to the plaintiff. To this argument the Court of Appeals said: "But that fact is insufficient to charge the plaintiff with knowledge of the character of the obligation. He in no sense represented or acted for the bank in the transaction, and whatever his knowledge respecting the note, it will not be imputable to the bank. National Bank *v.* Norton, 1 Hill, 572, 579; Mayor, etc., *v.* Tenth National Bank, 111 N. Y. 446, 457; Farmers', etc., Bank *v.* Payne, 25 Conn. 444. He was but one of the plaintiff's directors, who could only act as a board. National Bank *v.* Norton, *supra.* If he knew the fact that these were not individual, but corporate, notes, we cannot presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter. Bank of U. S. *v.* Davis, 2 Hill, 451. The knowledge with which the bank as his principal would be deemed chargeable so as to affect it would be where, as one of the board of directors and participating in the discount of the paper, he had acted affirmatively, or fraudulently, with respect to it, as in the case of Bank *v.* Davis, *supra*, by a fraudulent perversion of the bills from the object for which drawn; or as in Holden *v.* New York & Erie Bank, 72 N. Y. 286, where the president of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the president, as an individual or as an executor, was not imputable to the bank merely because he was the president, but because when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent. The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank." See, also, Merchants' National Bank of Gardner *v.* Clark, (1893) 139 N. Y. 314 (an action upon similar notes to those in the case above, made by the same parties defendant). In Bremen Saving Bank *v.* Branch-Crookes Saw Company, (1891) 104 Mo. 425, the defendant corporation was sued on a note purporting to be signed by it as maker and one B. as indorser. It defended in its answer on the ground that it was a manufacturing and business corporation; that its name was used by B., the then president of the corporation, for his own accommodation, and for the purpose of satisfying his prior individual debt; that the note was so executed without any consideration moving to the defendant, and that the plaintiff, when it accepted the note, had knowledge of the foregoing facts. The court held that if the

nal parties or any subsequent holder of this note accepting the same as collateral with full notice of all the facts and circumstances connected with the execution and delivery thereof, extrinsic evidence was admissible to show not only that the president and secretary executed the instrument in their official capacity as officers of the corporation, but also that the directors signed the note on the back thereof solely as officers of the corporation and to bind the corporation only.[1] In a Georgia case the promissory note on which the action was brought was signed by one as "ag't" payable to another, "pres't," and indorsed by the latter "president [name of corporation]." The action was brought by the indorsee, a bank, against the indorser individually and the corporation. In addition to the statutory form of such actions in that state, it was alleged that the maker was the agent and the indorser the president of the corporation, and that the money borrowed from the bank, and for which the note was given, was received and used by the corporation, and it undertook and promised to pay the bank. The effect of the statute of Georgia, that "where the agency is known, and this credit is

plaintiff was induced by defendant's conduct under the circumstances to believe in good faith that the defendant had assumed to pay the debt, though it did not in fact assume to pay it, defendant was liable. Citing Deere *v.* Marsden, 88 Mo. 512; Crawford *v.* Spencer, 92 Mo. 498; Fitzgerald *v.* Barker, 96 Mo. 661; Mechanics' Banking Assn. *v.* N. Y., etc., White Lead Co., 35 N. Y. 505; National Park Bank *v.* German-American Mut. W. & S. Co., 116 N. Y. 292; National Bank of Republic *v.* Young, (N. J.) 7 Atl. Rep. 488; Holmes, Booth & Haydens *v.* Willard, 24 N. Y. St. Repr. 260; Second National Bank *v.* Pottier & Stymus Mfg. Co., 18 N. Y. St. Repr. 954; Supervisors *v.* Schenck, 5 Wall. 784; La Fayette Savings Bank *v.* Stoneware Co., 2 Mo. App. 299.

[1] Kline *v.* Bank of Tescott, (1892) 50 Kans. 91. It was claimed in the case that the cashier of this bank, the assignee of the note, who was also a director of the corporation to the order of which the note was payable, assured these directors that the only way to make a corporation note was for the officers and directors of the corporation to sign their names and affix their official positions thereto, and that the note was thus signed under his direction to bind the corporation, but not the officers individually. The court said: "If the parties who wrote their names upon the back of the note as directors had signed their names upon the face thereof, they could have shown by extrinsic evidence that they were acting for the corporation only, and we perceive no reason why, as between the original parties or any subsequent holder of the note accepting the same as collateral, with full notice of all the facts and circumstances connected with the execution and delivery thereof, the same rule will not apply when such signatures are upon the back of the instrument before delivery."

not expressly given to the agent, he is not personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances of each case," was considered. The Supreme Court held that the suit against the payee individually was demurrable, the liability sought to be enforced being that of the corporation and not of its president individually; that the declaration showing on its face that the agency of the president was known, and that credit was extended to the principal, there being no allegation that credit was expressly extended to the agent; there was no issue which required submission to the jury. It was argued to the court that the statute had no application to the law-merchant and promissory notes the offspring of that law, and that the payee having been designated as "Pres't" merely when made the payee by the face of the note, was responsible individually, because he could not by the indorsement explain what that term "Pres't" meant; and when he turned over the note to the bank by his indorsement and gave them the control of the paper and title to sue it, he could not then limit his liability and indorse only as president. Of this contention the court said: "We cannot see the logic of any such conclusion, nor do we think that any such point has ever been adjudicated, even under the laws governing commercial paper unaffected by statute, as it is here, by the allegation that [the payee] and [maker] had power to contract for the corporation, and did so, and borrowed the money for the corporation that used it." It was also held that outside of the statute prior to indorsing the note payable to the order of the payee no liability arose against him; and when he indorsed it, the terms of such indorsement determined the contract between the indorser and indorsee, and the indorser could limit his liability by the terms thereof.[1]

§ **228. Liability of officers of savings banks.**—In a case where the trustees of a savings bank, the business of which had been a losing one from the start, its deposits not large and its expenses exceeding its income, doing business in hired rooms, purchased real estate for a large sum out of the funds in its care

[1] Bank of the University *v.* Hamilton, (1886) 78 Ga. 312. Cases as to indorsement of paper by officers: Middlesex County Bank *v.* Hirsch Bros. Veneer Mfg. Co., 4 N. Y. Supp. 385; Sheridan Electric Light Co. *v.* Chatham National Bank, 52 Hun, 575; s. c., 5 N. Y. Supp. 529.

and agreed to erect a building thereon at a further large cost, before the completion of the same the bank became hopelessly insolvent and passed into the hands of a receiver. The receiver brought his action against the trustees for damages on account of an improper investment of its funds on their part in the matter above stated. The New York Court of Appeals, considering the relation between these trustees and the bank to be that of agents and principals, and between them and the depositors as similar to that of trustee and *cestui que trust*, held, that in transcending the limits placed upon their power in the charter of the bank and causing damage to the bank or its depositors, they would be personally liable for the damages. They affirmed the judgment against the trustees in the lower courts and dismissed the appeal.[1] As agents of the bank such trustees are

[1] Hun, Receiver, *v.* Cary, (1880) 82 N. Y. 65, affirming 59 How. Pr. 426. The contention in this case on the part of the defense involved the extent of the care to be exercised by such trustees of the funds and the uses to which they devoted them. EARL, J., speaking for the court, after referring to the following cases: Scott *v.* De Peyster, 1 Edw. Ch. 513; Spering's Appeal, 71 Pa. St. 11; Hodges *v.* New England Screw Co., 1 R. I. 312; s. c. in 3 R. I. 1; The Liquidators of Western Bank *v.* Baird, 11 Sess. Cas. (3d series) 112 (Scotch); The Charitable Corporation *v* Sutton, 2 Atk. 405, and Litchfield *v.* White, 3 Sandf. 545, said: "In Spering's Appeal Judge SHARSWOOD said that directors 'are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body.' As I understand this language I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatory, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatory, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Story on Bailments, § 182. Such is the rule applicable to public officers, professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge, and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exer-

responsible to it for misfeasance or nonfeasance causing damage to the bank, upon the same principle that any agent is for like cause responsible to his principal.[1] The Chancery Court of New Jersey has held the treasurer of a savings bank, at the same time one of its managers, who had assigned to the bank a bond and mortgage owned by him on land not worth double the mortgage as required by the bank's charter, and without submitting the investment to the finance committee for approval, as required by its by-laws, personally liable for the loss sustained on the bond and mortgage. Further, that the fact that the manager did not object or repudiate the transaction for six years was no defense whether his breach of duty was known or not known by the other managers.[2]

cise the ordinary skill and judgment requisite for the discharge of their delicate trust."

[1] Hun *v.* Cary, (1880) 82 N. Y. 65. That they may be treated as agents of the bank, see In re German Mining Co., 27 Eng. Law & Eq. 158; Belknap *v.* Davis, 19 Me. 455; Bedford R. R. Co. *v.* Bowser, 48 Pa. St. 29; Butts *v.* Wood, 38 Barb. 181; Austin *v.* Daniels, 4 Denio, 299; O. & N. R. R. Co. *v.* McPherson, 35 Mo. 13. As to the liability of trustees to restore the money illegally invested by them, see Adair *v.* Brimmer, 74 N. Y. 553; London *v.* Birmingham R. R. Co., 5 De Gex & Smales, 414.

[2] Williams, Receiver, *v.* Riley, (1881) 34 N. J. Eq. 398. It was said by the chancellor: "The defendant willfully disregarded the regulations made by the board of managers for the security of the depositors, by which it was, in effect, provided that no investment should be made unless approved by the finance committee, and that all applications for investment of the funds should be made to them alone. With full knowledge that the investment not only had not been duly authorized, but was one forbidden by the charter, he, with the concurrence of the president, indeed, but, nevertheless, in violation of his duty and trust, as it was in violation of the duty and trust of the president, took from the funds of the bank, by check drawn by himself as treasurer, the amount of the bond and mortgage on the assignment of these instruments to the bank. Nor can he shelter himself under the suggestion that though he was a manager and officer, he is to be regarded as standing in the relation of a stranger to the bank in this transaction. He was a trustee, and, as such, bound to protect the interests of his *cestuis que trust.* That obligation involved a strict adherence to the provisions of the charter and the regulations of the bank designed for their protection. He would not have been at liberty to disregard them if the application had come from a stranger. On what principle can he be justified in disregarding them in his own dealings with the bank? Had a stranger sought to obtain from the bank the money for the bond and mortgage, it would have been the duty of the defendant, if the matter came to his knowledge in time, to object to it, and if his objection had been unheeded it would have then been incumbent on him to do what he could to prevent the illegal transaction. Crane *v.* Hearn, 11 C. E. Green (N. J.),

§ 229. Liability of a treasurer of a corporation for payment of orders on forged indorsements.— Certain orders upon the treasurer of a building association, a Pennsylvania corporation, signed by the president and attested by the secretary, to certain payees, were paid by the treasurer to the secretary, the latter having forged indorsements of the payee upon the same. The association brought its action upon the bond of the treasurer to hold him liable for these improper payments, as they contended. The Supreme Court of the state held that the treasurer should have had judgment in his favor.[1]

378. Manifestly he is without excuse now. He has been guilty of a misapplication, at least, of the funds of the bank, and where there has been a waste or misapplication of the funds of a corporation by an officer or agent of the corporation suit may be brought in equity, in the name of the company, to compel him to account for such waste or misapplication or breach of trust. Citizens' Loan Association *v.* Lyon, 29 N. J. Eq. 110; s. c., affd. on appeal, 30 N. J. Eq. 732. Here the misapplication was by one who was not only an officer of the institution but a trustee also. Stockton *v.* Mechanics & Labor. Sav. Bank, 32 N. J. Eq. 163; Hannon *v.* Williams, 34 N. J. Eq. 255. And he is bound to indemnify his *cestuis que trust*, and the receiver may maintain suit against him to obtain the indemnity."

[1] Hibernia Building Assn. *v.* McGrath, (1893) 154 Pa. St. 296. The opinion rendered by THOMPSON, Justice, fully presented the facts and the by-laws regulating the conduct and acts of officers, and fully discussed the law applicable to such a case, as follows: "The ground of liability was negligence in making these payments, although made upon orders signed by the president and secretary, who also attested the signatures of the payees. The money was either paid in cash to the secretary, or by cheques payable to his order. Under the by-laws the president was required to sign all orders drawn upon the treasurer for appropriations made by the board, the secretary to keep accurate minutes, to attest all orders drawn on treasurer for appropriations made by the board, the treasurer to pay all orders drawn on him by order of the board, if signed by the president and attested by the secretary. The orders upon which these payments were made were in the usual form, and signed by the president and attested by the secretary. The [treasurer] having no reason to suspect or doubt the integrity of either the president or the secretary, and acting in good faith, paid them. As the [treasurer] served without compensation for his services he became a gratuitous bailee, and as such is to be held liable for gross negligence only. In Tompkins *v.* Saltmarsh, 14 Serg. & R. 275, it was said: 'Tompkins is charged, as the bailee of Saltmarsh, on an undertaking to perform a gratuitous act, from which he was to receive no benefit, and the benefit was solely to accrue to the bailor, in which case the bailee is only liable for gross negligence, *dolo proximus*, a practice equal to a fraud.' This rule thus stated is repeated in Scott *v.* Bank of Chester Valley, 72 Pa. St. 471; Bank of Carlisle *v.* Graham, 79 Pa. St. 117. His designation as treasurer did not change the character of the bailment. As provided in the by-laws the money

§ 230. Liability on a contract made before complete organization of the corporation.— In an Ohio case it appeared that individuals who had undertaken to have an association known as the "Wool Growers' Exchange" incorporated under the laws of Ohio obtained a certificate of incorporation, and before the requirement of the law as to the subscription to the stock of a certain percentage of the capital stock before doing business had

was deposited with him to be paid out when required upon orders drawn in the manner as stated. A treasurer or a director may become a gratuitous bailee, and his official position and designation will not in any degree change his liability as such bailee. In Swentzel *v.* Bank, 147 Pa. St. 153, it was held that directors who are gratuitous mandatories were only liable for fraud or such gross neglect that amounts to fraud. In this case the [treasurer] had no office or place in which, as treasurer, he transacted the business of the association. When orders were to be paid he testifies he would get notice from the secretary to come down and see him; that he had some that he wanted paid, and that he would go to the secretary's store and would there pay them to him. The [association's] business was managed principally by its secretary, who came in contact directly with its members. In view of the by-law and the modes of payment, it is very clear that he was a gratuitous bailee, and is to be held only to that diligence required as such. It is true he gave a bond as required by the by-law for the faithful performance of his duties, but that did not change the duty cast upon him by law as a bailee. The condition of the bond was that he should perform and discharge the duties of the office, and shall keep a just and true account of the moneys received, and shall pay to his successor the moneys received, and shall account for the moneys so received. The condition of the bond, therefore, was that he should faithfully perform the duties in regard to the bailment that the law required him to perform. It is, however, contended that as the bond provides that he shall discharge all the duties now required or may hereafter be required of him as treasurer by the constitution, charter, by-laws, rules and regulations of said association, and as the board passed a resolution that all applications for withdrawals of stock must be approved by the board of directors at regular or special meetings of the association before payments are made, the [treasurer] was guilty of negligence, without examining the minutes and without satisfying himself that the board had acted upon the withdrawals for which the orders in question purported to have been drawn. It is established by the proofs that no entries were made upon the minutes for [of?] application of [for?] withdrawals after 1884. In point of fact the secretary, after this date, kept no record in the minutes of any withdrawals. The duty of the president is to preside at all meetings of the board and to sign all orders for appropriations authorized by the board; that of the secretary is to keep accurate minutes of all meetings of the board, the accounts of the association, and to attest all orders on the treasurer for appropriations of the board. These orders in question were signed by the president and were attested by the secretary in the usual form. The president was and is still regarded as an upright man; the secretary was also at this time so regarded; the asso-

been complied with, had a meeting of stockholders and were elected directors and officers of the association. They then entered into a contract for the purchase of wool, and for an unpaid balance gave a note through the officers of the association. The holder of the note brought action upon the note as the foundation of the suit against these directors as personally liable on the contract under the facts disclosed in the case. The Supreme Court of Ohio held them liable personally on the contract.[1] The court discussed quite at length the liability of agents under such circumstances, and then said: "While, however, the authorities generally agree that a person who, without having in fact authority to make a contract as agent, yet does so under the *bona fide* belief that such authority is vested in him, is nevertheless personally responsible to those who contract with him in ignorance of his want of authority, a diversity of opinion is found in the cases in regard to the exact nature of the liability, and the character of the action by which it may be enforced. In Jenkins *v.* Hutchinson, 13 Ad. & E. 746, it is intimated by ERLE, J., that an action of decit would lie in such cases, notwithstanding the good faith of the agent, and some authorities may be found to that effect. Another class of cases hold that the liability is upon the contract; but, it is believed, that whether the agent is so liable, depends upon the intention of the parties as discovered from the contract itself; and on this question the form of the agreement and the mode of signature may be quite conclusive. The rule on this subject, as stated in Story on Agency, is that an agent cannot be sued on the very instrument itself, as a contracting party, unless there be apt words to charge him. Section 264*a*. Still another class of cases establish the rule, which we are inclined to adopt, that in cases like the one we are considering, the agent is liable upon his implied promise that he pos-

ciation trusted both of them implicitly, and had no reason or cause to doubt them. If it treated them thus, it was natural that the [treasurer] should in no manner suspect or doubt them. These orders, therefore, came to him with the certificate of the presiding officer, whose duty it was to preside at all meetings, and with the attestation of the secretary, whose duty it was to keep all records of the meetings. If the [treasurer] had gone to the secretary he would doubtless have been assured that the board had acted upon these withdrawals, and having been so advised he would have been justified in paying them. It can be scarcely said to be want of ordinary diligence to have paid these orders under these circumstances and with these signatures. They were, in fact, as express an authorization as if he had seen these officers officially. It was said in Swenzel *v.* Penn. Bank, *supra:* 'Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high. They were the trusted agents of the corporation.' The [treasurer] was not guilty of negligence in trusting the secretary and in putting full faith in his action, and that of the president in signing and sending to him the orders in question."

[1] Trust Co. *v.* Floyd, (1890) 47 Ohio St. 525; s. c., 26 N. E. Rep. 110. The

Supreme Court of Kansas affirmed a judgment against alleged directors of an athletic association upon a contract for goods furnished, holding them individually liable on the ground that the corporation had not been fully organized under the law. They said upon the subject generally: "The rule is well established

sesses the authority he assumes to have. Smith's Leading Cases, vol. 2, pt. 1, 408 (8th ed.), and cases there cited; Lewis *v.* Nicholson, 83 Eng. C. L. 512. In White *v.* Madison, 26 N. Y. 117, in a learned opinion, it is held that the liability of the agent in such cases rests upon the ground that he warrants his authority, and not that the contract is to be deemed his own. Bartholomew *v.* Bentley, 15 Ohio, 659, is referred to as establishing both that the liability of the agent in cases of this kind is founded on fraud, and that the petition should charge a fraudulent intent in direct terms. That was an action in case for deceit under the practice which prevailed before the adoption of the Code of Civil Procedure. The questions arising upon the demurrer related to the form of the remedy, and the sufficiency of the declaration in such an action. They are stated by BIRCHARD, J., to be: '*First.* Can a special action on the case for fraud, which has resulted in damage of the plaintiffs, be maintained in a case like this upon sufficient declaration? *Second.* Is this declaration good upon demurrer?' The court answers the first question in the affirmative, and, in speaking of the declaration, says: 'The objection taken by counsel is a want of certainty. The action is founded on a fraudulent combination, and for holding out false colors at the commencement of the banking operations, and at various subsequent periods. The only direct charge of a fraudulent intention is in the withdrawal of the funds, and this, for aught that appears, may have been long since the bills in plaintiff's hands were issued. * * * It is thought that the averment of a fraudulent design should have been made in positive terms as to each specific act relied upon to sustain the action.' Under the practice then in force, pleadings were subject to demurrer, unless they were appropriate in their form and allegations to the particular action pursued; and we do not understand it to be there decided that no other action could be maintained on the facts of that case. A different action was maintained in Medill *v.* Collier, 16 Ohio St. 599, which, so far as the ground upon the liability of the bank directors was placed, is not greatly dissimilar to the case before us. Under our present system of pleading, it is not important what was formerly the most appropriate remedy. Upon the facts stated in the petition, the law, we think, implied a promise on the part of the defendants, that in making the contract with the plaintiff, they had authority to bind the corporation they assumed to represent; and if they had not, they are answerable for the consequences. That they were without such authority seems clear. Upon the lack of authority upon the part of the directors, it was then said: 'It was held by this court in Bartholomew *v.* Bentley, 1 Ohio St. 37, that while mere irregularities in organizing a corporation would not subject the officers to private liability, to protect them from such liability, the provisions of the act of incorporation must be substantially pursued. By our statutes, under which the proceedings

that a corporation must have a full and complete organization and existence as an entity, and in accordance with the law to which it owes its origin, before it can assume its franchise or enter into any kind of a contract or transact any business; and whatever be the mode prescribed by the act of incorporation, a substantial compliance with all the provisions of the law under which it is created is required before the corporation can be said to have such an existence as will entitle it to do business.[1] And it is conceded in this case that nothing was done to perfect the organization after the charter was filed. A corporation cannot act without officers and agents, and it is powerless to do anything until its incorporators or promoters give it the means whereby it can act. The words "organize" or "organization" have a well-understood meaning; and as we construe them they mean the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws and such other steps as are necessary to endow the legal entity with the capacity to

were taken for the formation of the corporation referred to in the petition, the corporate powers, business and property of corporations formed for profit must be exercised, conducted and controlled by a board of directors, all of whom must be stockholders; the articles of association must state the amount of the capital stock, and the number of shares into which it is divided; and at least ten per cent of that amount must be subscribed before directors can be chosen. So that the subscription of the necessary amount of the capital stock to authorize the election of directors is not only a matter of substance, but is essential to the organization of the corporation, and necessary to the transaction of business by it. It is the security which the law requires shall be provided before the corporation enters upon its business for the protection of those who may deal with it. The statutory liability of the stock subscribers is an additional security. In the effort to form the corporation in question, neither of these securities was provided. Counsel contend that it is, nevertheless, a corporation *de facto*, and estopped to deny its liability to the plaintiff. If it were, it is not readily perceived how this would aid the defendants. Until there were stock subscriptions to an amount warranting the organization, the subscribers could not be compelled to pay beyond the sum required at the time of the subscription; nor would the statutory liability attach, unless there were some ground of estoppel, not appearing in the case. The implied undertaking of the defendants was that they represented a corporation with the capital stock required by law; while the one to which they insist the plaintiff shall be compelled to resort was, if a *de facto* corporation, so only in name, without substance or capacity; and if the doctrine of estoppel could be brought to the aid of the plaintiff against it, the defendants are not in a position to require a resort to that remedy to relieve them from the liability they have incurred.' "

[1] Citing 4 Am. & Eng. Encycl. of Law, 197, and authorities cited there.

transact the legitimate business for which it was created. In this sense the corporation was not fully organized. While it had an existence, the organization was never completed so that the corporation could do business. In the case of Hart *v.* Salisbury, 55 Mo. 310, which was an action brought upon a note purporting to have been executed by the directors of an agricultural association, the suit was brought against the directors upon the ground that the association was not incorporated at the time the note was given, and that the directors were, therefore, individually liable. It appeared that the association was not fully incorporated when the note was executed. The law required the charter to be filed with the recorder of the county where the corporation was located, and also in the office of the secretary of state. The charter was only filed with the recorder. The court held that the officers of the corporation had no power to issue the note, and that a note issued and signed by them would bind them personally and not the corporation. The court said, in speaking of the attempted organization of that corporation: It had organized under section 2, chapter 69, General Statutes of 1885, page 367, by signing and acknowledging and recording in the recorder's office of the proper county the articles of the association. This step being taken, it was an organized corporation, not for the transaction of business, but for the purpose of taking the next and last step to complete its authority to transact business and give date to its legal existence. Until the officers took this final and necessary step by depositing and filing in the office of the secretary of state a copy of the articles of association as they stood recorded in the county, this corporation had no power to issue the note sued on. As it had no power to issue this note, the defendants are undoubtedly liable." "If a corporation be illegally formed, its members or stockholders are liable as partners for its acts or contracts; and directors, officers or agents acting and contracting in its name render themselves personally liable." Beach Priv. Corp. § 16; Marshall *v.* Harris, 55 Iowa, 182; Kaiser *v.* Savings Bank, 56 Iowa, 104; Coleman *v.* Coleman, 78 Ind. 344. The Kansas court resumed: "While in this case the charter was filed with the secretary of state, the corporation had no officer outside of the directors named for the first year. No portion of the capital stock had been subscribed and no books opened, as required by section 1173 of the General Statutes of 1889. In

fact nothing had been done to complete the preliminary business of organizing the corporation. We do not understand that a corporation can proceed to the transaction of business without any portion of its capital stock being subscribed or paid. It may have been the English rule, but in the United States it is otherwise. Boone Corp. § 113. The corporation has no means or capacity to act until some portion of the capital stock named in the charter has been subscribed and paid. Some states have by a legislative rule made directors of certain corporations jointly and severally liable for all debts of the corporation until the whole amount of the capital stock has been paid in. Rev. Stat. of Wis. 1878, § 1901."[1]

§ 231. **Rule as to recovery in such a case.**— The measure of damages in such a case was one of the questions in this Ohio case. Referring to the theory upon which, as it appeared, the case was tried, that if the defendants were liable at all, the amount which the plaintiff was entitled to recover was the balance due on the contract, the Supreme Court of Ohio said: "This was not necessarily the measure of recovery. As we have already seen, the action in such cases is not founded on the contract made for the supposed principal, but as the implied promise of the agent that he had authority to bind the principal; and the damages which may be recovered for its breach is the loss sustained by the plaintiff by reason of his not having the valid contract which the agent undertook that he should have. The damages may sometimes exceed the amount due on the contract made in the name of the principal, for it is held they may include the costs and expenses of an unsuccessful action against the principal to enforce the contract. White *v.* Madison, 26 N. Y. 117; Simons *v.* Patchett, 7 E. & B. 568; Collen *v.* Wright, 7 E. & B. 301; 2 Smith's Leading Cases, 410. In Morawetz on Corporations it is said that the measure of damages in an action against directors or officers of a corporation, who induce a person to deal with it before the capital indicated in its charter has in fact been provided, is the loss sustained 'by reason of the difference between the capital which he has received and that which he was entitled to expect.' Under this rule, we think, the plaintiff might properly recover the balance remaining unpaid and the purchase price of

[1] Walton *v.* Oliver, (1892) 49 Kans. 107, 112, 113, 114; s. c., 30 Pac. Rep. 172.

the wool sold. *Prima facie*, that is the amount of the plaintiff's loss, and it does not exceed the amount of the capital which the corporation was required by law to have before it could be represented by the directors, and which the defendants, by assuming to act for it, undertook that it did have. It is true the petition alleges that the corporation is insolvent with an indebtedness exceeding ten per cent of the capital stock; but whether the claims of other creditors stand upon a like footing with that of the plaintiff, or will be enforced against the defendants, does not appear. Besides, if the proper stock subscriptions had been obtained, the corporation might not have become insolvent, or, before it did, the plaintiff's claim might have been paid or secured. If, in such case, the plaintiff could recover no more than a sum equal to the proportion of the capital which should have been provided that his claim bears to the whole indebtedness contracted in the corporate name, it would be necessary to take an account of the assets and liabilities to determine the amount of the recovery. That rule, applied to this case, would require that the defendants be charged with an amount equal to the necessary stock subscriptions, and the statutory liability of the subscribers, and that all the creditors be brought in to have their claims adjusted, before the amount of the verdict could be arrived at."[1]

§ 232. **County treasurer liable upon his receipts to collector for money.**—A county auditor in California made a settlement with a collector of license taxes of the county, determined the amount due the county from this collector and certified the same to the county treasurer. The county treasurer gave a receipt for the amount to the collector, and the collector, upon presenting it to the county auditor, received his discharge, and the auditor charged the same to the treasurer. The latter, also, debited himself to that amount in his account with the county. When he went out of office there was a deficiency of a certain amount, and an action was brought upon his bond by the county to recover the deficiency. The defense made by the treasurer and his sureties was that, in reality, the sum of money due from the collector was not paid in full to him, and that the collector was the one indebted to the county. The Supreme Court of

[1] Trust Company *v.* Floyd, (1890) 47 Ohio St. 525, 542, 543; s. c., 26 N. E. Rep. 110.

California held that, assuming the facts to be as contended by the treasurer and his sureties, they did not constitute a defense to the action.[1]

§ 233. County treasurer liable as bailee of county funds.— In a Colorado case the governing authorities of a county sought, claiming a shortage in the accounts of a county treasurer, deceased, to follow the funds as trust funds in his estate as held by his representatives and to have a preference over other creditors of the estate. The Supreme Court in its opinion first considered the question of the relationship held by a county treasurer to the funds coming into his hands by virtue of his office,

[1] San Luis Obispo County *v.* Pettit, (Cal. 1893) 34 Pac. Rep. 1082. The court said: "Section 115 of the County Government Act (St. 1891, p. 323) requires the county auditor to settle the accounts of all persons holding moneys payable into the county treasury, and to certify the amount to the treasurer; and provides that, upon the presentation and filing of the treasurer's receipt therefor, he shall give to such persons a discharge, and charge the treasurer with the amount received by him. In Butte Co. *v.* Morgan, 76 Cal. 1; s. c., 18 Pac. Rep. 115, it was held that the auditor is not required to go to the treasurer and ask him whether the amount has been actually paid, or, in other words, whether the receipt states the truth. He is authorized to accept the receipt as sufficient evidence of the fact of payment. This case presents many points similar to the present one, and must be regarded as controlling. Section 80 of the County Government Act requires the treasurer to settle his accounts with the auditor on the first Monday of each month, and, for the purpose of making such settlement, to make a statement under oath of the amount of money received prior to the period of such settlement, the sources whence the same was derived, and the amount remaining on hand. These settlements and statements were made by [this treasurer], and he ought not now to be permitted to exonerate himself from liability to the county by showing that these statements were false, and that, instead of requiring [the collector] to pay the money into the treasury, he had taken his individual promise to pay it at a subsequent date. By delivering to the auditor his receipt for the moneys which [the collector] had collected, he had authorized the auditor to enter upon his books a discharge of [the collector's] liability, and is thereby estopped from questioning the correctness of his receipt. If he chose to permit [the collector] to retain this money upon his promise to subsequently pay it to him, to that extent he failed to perform his official duty in requiring the money to be paid into the treasury, and must be regarded as having become himself, rather than the county, the creditor of [the collector]. If any loss occurred by reason of [the collector's] subsequent failure to pay his check, it should be borne by [the treasurer], rather than by the county, since the loss had been made possible by reason of [the collector's] violation of his official duty, and his sureties are liable to the county equally with him for such misappropriation or loss of the money."

the contention by the county authorities being that the relation was that of bailee of the funds, and that of the representatives of the estate that the relation of debtor and creditor existed between him and the county. The court said: "Without determining where the weight of authority lies on this question, as there is much conflict between the adjudged cases, we think that, under the provisions of the statute relating to a county treasurer, the money collected and received by him belongs to the county, and that he holds a fiduciary relationship thereto that constitutes him a bailee, with express and extraordinary liability. The bond he is required to give before entering upon the duties of his office is conditioned that he 'shall faithfully and promptly perform the duties of said office * * * pay, according to law, all moneys which shall come to his hands as treasurer, and shall render a just and true account thereof, whenever required by said board of commissioners or by any provision of law, and shall deliver over to his successor in office, or to any other person authorized by law to receive the same, all moneys, books, papers, and other things appertaining thereto or belonging to his office.' Mills' Ann. St. § 886. Section 890 of Mills' Annotated Statutes provides: 'It shall be the duty of the county treasurer to receive all moneys belonging to the county from whatever source they may be derived. * * * All moneys received by him for the use of the county shall be paid out by him only on the orders of the board of commissioners, according to law, except where special provision for the payment thereof is or shall be otherwise made by law.' It is further provided in section 901 of Mills' Annotated Statutes: 'Upon the resignation or removal from office of any county treasurer all the books and papers belonging to his office shall be delivered to his successor in office, upon the oath of such preceding treasurer, or, in case of his death, upon oath of his executors or administrators, etc.' The Supreme Court of Indiana having announced the doctrine in several cases that a township trustee, in common with a county treasurer, was not a mere bailee, but the owner of the money that came into his hands by virtue of his office, that court distinguished and limited such ownership in Rowley *v.* Fair, 104 Ind. 189; s. c., 3 N. E. Rep. 860, as follows: 'But the title of a township trustee in the money for which he is held accountable is only recognized to the extent that is necessary for the better preservation of the various

funds which the money represents, and is, in fact, a legal title only in a technical and very limited sense. The equitable title to, and the beneficiary interest in, such money is in the township, and in that view the money for which the trustee is liable upon his bond really belongs to the township.' It follows that, if the money received by the treasurer by virtue of his office belongs to the county, it constitutes a trust fund, which, if diverted and misappropriated, may be recovered in an action upon his bond, or the county may, if it elect, treat it as a trust fund, and follow it wherever it can be traced."[1]

§ 234. County treasurer paying court orders on forged indorsements.— It appeared in a Minnesota case that a deputy clerk of the District Court issued false and fraudulent certificates, in which he certified that certain named persons had served as jurors in said court, and were each entitled to a stated sum of money payable to their order as compensation. He obtained the written order of the county auditor on each, directing the county treasurer to pay the same. He forged the names of the respective payees on the back of each certificate, presented the same to the treasurer, and the latter paid over to him the amounts called for out of the county funds, without attempting to satisfy himself of the genuineness of the indorsements upon the backs of the instruments. The Supreme Court held that the treasurer was liable to the county for the sums so paid out.[2]

[1] McClure *v.* Board of Comrs. of La Plata County, (Colo. 1893) 34 Pac. Rep. 763; citing Sauer *v.* Town of Nevadaville, 14 Colo. 54; s. c., 23 Pac. Rep. 87.

[2] Board of County Commissioners of Ramsey Co. *v.* Nelson, (1892) 51 Minn. 79. *Arguendo,* the court said: "The distinction between a case arising on these facts and * * * Sweet *v.* County Commissioners of Carver County, 16 Minn. 106, is obvious. There the county orders or warrants had been issued and accepted, made payable to a certain named person or to bearer. They were transferable by simple delivery, and, in terms, the treasurer was expressly authorized to pay to the bearer. This he did without knowledge of any defect in the title of the bearer, and it was held, such payment being in good faith every way, that the county was exonerated from further liability. The conclusion of the court was expressly placed upon the fact that in good faith the county treasurer had paid these obligations precisely as he was authorized and directed to do, to the person who presented them, the bearer thereof. But the cases are not analogous, for, giving to defendant the benefit of all that is possible, namely, that together the certificates as issued and the indorsements thereon as made by the county auditor amounted to

§ 235. Arbitration as to liability of a treasurer of a township.— The treasurer of a township having used the moneys of the public corporation there was a submission of the question of the extent of his liability upon his bond to arbitration, and a settlement made upon the basis of the award, the bondsmen released and in part settlement of the matter notes given to the township. In an action upon one of these notes the treasurer intervened, and the insistment on his behalf was that the arbitration could not be sustained because the corporation's powers were only such as were given by statute, and no express power was given to submit to arbitration. To this the Supreme Court of

orders or warrants upon the county treasury, the prominent and stubborn fact remains that the amounts said to be due thereon were not to be paid to a bearer of the instruments, but to the order of the several persons named therein as payees. As in the case just referred to, the authority to pay was express and distinct, but instead of directing that such payment should be to whomsoever might present the orders or warrants, the direction was that payment should be made to the order of a person designated by name. And at this time it may be well to state that it does not appear in the complaint, as appellant's counsel seem to assume, that fictitious or nonexistent persons were named as payees in these certificates. It is of no importance, probably, but from the language of the pleading the presumption is otherwise. Payments were not made to the persons named as payees, or to their order, in accordance with the terms of the certificates, but were made to * * * the very person who as deputy clerk had the opportunity and had fraudulently issued the same, solely upon the false and forged indorsements of the names of the payees. Common prudence ought to have suggested to [the treasurer] that before making such payments it was incumbent upon him to ascertain and satisfy himself of the genuineness of the signatures which he found indorsed upon the backs of the instruments purporting to be those of the payees therein named. He failed so to do, and this of itself is sufficient to sustain the charge of negligence in the performance of his official duty. As was said by the learned trial judge, had defendant observed the rule of law which governs in commercial transactions of the same nature, he would have detected the forgeries at the outset, and there could have been no great loss to the county or to himself. His disregard of this rule was negligence, undoubtedly, and it was the immediate and proximate cause of the loss to the county, for which defendant must be held responsible, unless the fact that the certificates were fraudulently issued by the deputy of another county officer for whose malfeasance such officer was also responsible to the county can be allowed to excuse and relieve him. The instruments in question were certificates of indebtedness for jurors' services falsely stated to have been rendered by the payees therein named, and on whose order payment was to be made. At most, they were the orders of one officer of a municipal corporation upon another officer for the paying out of municipal funds. Although negotiable in form, they were not commercial paper in any

Iowa said: "A corporation has, however, not only such powers as are expressly conferred, but such others as are reasonably incident to the exercise of those expressly conferred. The intervenor's theory is that the plaintiff [the corporation] should be confined to its remedy by action. But the power which it is conceded that the plaintiff has to maintain an action does not appear to be expressly conferred. The plaintiff has express power to make settlement with its treasurer, and must be deemed, by implication, to have power to enforce, by action, both settlement and payment, if necessary. But an arbitration of differ-

sense. That they were in fact fraudulently issued could not relieve the defendant treasurer from the obligation which rested upon him to see to it that he paid the same to the persons to whom payment was directed. Had he done this in good faith, we are unable to see why his duty would not have been performed, and in his failure to pay as directed lies the claim that he was negligent. Had the certificates been regularly issued payment upon forged indorsements would not have excused the defendant treasurer, nor could it have relieved the county from a just indebtedness for jurors' services. The liability of the county treasurer for the funds intrusted to his care cannot be allowed to depend upon the fidelity of some other county officer, but is with him alone, and to be determined by his actions. Nor can the right of the county to require of him that he account for the public funds be limited or controlled by the fact that it may also look elsewhere for relief in case of loss. For the bad conduct of the deputy in fraudulently issuing the certificates the county may have a right of action against his principal, the clerk of the court; but it is not confined to that action; it is not obliged to look to him alone. Unless it be upon the theory that as these certificates were issued without the rendition of services, and fraudulently, the payees must necessarily have been fictitious and nonexistent, we do not quite understand the assertion of counsel that no payees were named, and, therefore, the instruments were payable to bearer; or the pertinency of the authorities collated by counsel to the effect that, where a payee's name is left blank in a bill or note when the same issued, such bill or note is in legal effect payable to bearer, and until the payee is actually named the paper will circulate as though made payable to bearer in terms. We have already stated that from the averments of the complaint the presumption is that the payees named were not fictitious or nonexistent, but in any event the weight of authority is that the rule cited by counsel applies only to paper put into circulation by a maker with knowledge that the name of the payee does not represent a real person. Shipman *v.* Bank of New York, 126 N. Y. 318; s. c., 27 N. E. Rep. 371. The rule can have no application to the issuance of county orders or warrants. There is absolutely nothing in the appellant's position that the county is estopped from saying that the payees named were fictitious and the indorsements forged. The wrongful acts of the officers of a municipal corporation cannot create an estoppel against the corporation, the taxpayers, or the people." Citing Mayor *v.* Ray, 19 Wall. 468.

ences is just as legitimate a mode of settlement as by action. Courts, indeed, are disposed to encourage settlements by arbitration. Zook *v.* Spray, 38 Iowa, 273. We may add that such settlements seem to be peculiarly appropriate where arbitrators, possessing more or less of an expert character, can be called into requisition. We presume that the intervenor could not deny that private corporations may submit to arbitration. But, in our opinion, the power may properly enough be exercised by public corporations also. It was held in Dix *v.* Town of Dummerston, 19 Vt. 262, that selectmen, having power to audit and allow claims, might submit to a reference. As having some bearing upon the same question, see, also, Inhabitants of Boston *v.* Brazer, 11 Mass. 447; Brady *v.* Mayor of Brooklyn, 1 Barb. 584."[1]

§ 236. Liability under special provisions of charter or statute.— Where the charter of a corporation makes every director personally liable for the debts of the corporation during his administration to an amount not to exceed a fixed sum, an action in equity may be maintained by a creditor against the directors as it would prevent a multiplicity of suits, and the liability of all the parties interested could be determined in the one suit. In such case the corporation would not be a necessary party defendant when the suit is first brought, nor would it be necessary to make all the creditors parties plaintiff.[2] And it

[1] District Township of Walnut *v.* Rankin, (1886) 70 Iowa, 65, 66, 67.

[2] Bauer *v.* Platt, (1893) 72 Hun, 326; s. c., 25 N. Y. Supp. 426. PARKER, J., speaking for the court said: "The purpose of the provision [of the charter] was not only to insure vigilance on the part of the directors, but to further assure to the creditors of the company payment of their claims. It has for its object the protection of all creditors, not a portion of them. That result might not be effectuated if each creditor should be compelled to resort to an action at law. The liability of each director does not exceed five thousand dollars. If then, each director should suffer judgment to go against him by default, the creditors first suing might recover their entire claims, while others less prompt would not receive anything. If the directors should find that the amount of their statutory liability would not equal the deficiency of the company to its creditors some or all of them might arrange for a preference of creditors by answering, or demurring in some cases, while suffering default in others. By such methods, which even the vigilant prosecutor could not overcome, some creditors might be paid in full while others would receive little or nothing. As the statute was intended for the benefit of all creditors, and all of them, as well as some of them, must be presumed to have trusted in part to the protection assured them by its provisions, it is no more than just

would be of advantage to the directors to bring them all into court on the equity side, as they cannot be decreed to pay more individually than the liability named in the charter and assured by them when they became directors. Besides, such a suit is adapted for their protection in such cases from the possibility of vexatious litigation. If the amount due creditors equals or exceeds the aggregate of the statutory liability of the directors, the judgment decreeing that each make payment of the sum for which he is liable will relieve him from the annoyance and expense of further litigation; on the other hand, if it should prove to be less, the judgment will provide for a ratable payment, and, in addition to the other litigation which would otherwise be threatened, possibly an action for contribution may be avoided.[1] The trustees, directors or managers of any society or corporation organized under the provisions of this New York statute,[2] by a section of that statute are made "jointly and severally liable for all debts due from said society or corporation contracted while they are trustees, provided said debts are payable one year from the time they shall have been contracted, and provided a suit for the collection of the same shall be brought within one year after the debt shall become due and payable." In an action brought against a trustee of a club which was organized under this statute for the recovery of the amount of a promissory note of the club payable at four months from date, it was held by the Court of Common Pleas of the city of New York, in General Term, that a judgment against the corporation was not requisite; also that a judgment against one trustee upon his several liability would not discharge or affect the liability of another trustee.[3] The Supreme Court of New York, in General Term, has sustained the constitutionality of this statute. And they have also held that the creditor under it seeking to charge the trustees need not exhaust his remedy against the corporation before suing the trustees, and

that each creditor should share ratably in the fund which an enforcement of the liability of the directors will produce." The court referred to Board of Supervisors *v.* Deyoe, 77 N. Y. 219; Weeks *v.* Love, 50 N. Y. 568, which followed Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473; and Garrison *v.* Howe, 17 N. Y. 458; also to Pfohl *v.* Simpson, 74 N. Y. 137, as directly applicable and controlling in this case.

[1] PARKER, J., in Bauer *v.* Platt, (1893) 72 Hun, 326; s. c., 25 N. Y. Supp. 426.

[2] N. Y. Laws, 1875, chap. 267.

[3] Strauss *v.* Trotter, (1893) 6 Misc. Rep. 77; s. c., 26 N. Y. Supp. 20.

the action may be maintained against any or all of the trustees.[1] They also held that, to create a liability on the part of the trustees of this club (the action being upon promissory notes of the club), they must have been directors of the corporation at the time of the creation of the indebtedness, and that the fact that they were trustees of the club at the time of the giving of the notes, if they were given for a past indebtedness, was not sufficient to charge them with liability.[2] A prior recovery of a judgment against a corporation is not essential to the maintenance of an action to enforce the personal liability of a director where, under the charter of the corporation, every director is made personally liable in an action at law for the corporate debts. And other creditors and directors need not be joined as parties in such actions.[3] The Supreme Court of New York, in General Term, has held that the obtaining of a judgment against a corporation by a creditor, who at the same time was a stockholder and trustee, with the cooperation of the board of the associate trustees, the corporation being insolvent, was a violation of the statute of New York which prohibits the assigning or disposing of its property by any corporation's officers, for the payment of a debt, or from making any transfer in contemplation of insolvency; also that a sale of the property under such a judgment was void as to other judgment creditors.[4] But should there not appear an intent to defraud creditors, except as derived from the statute, and this judgment creditor purchase the property at the sale under his judgment, and afterwards satisfy a given mortgage upon it, besides other outstanding indebtedness of the corporation, the lien of the other judgment creditors would be subject to such mortgage and indebtedness.[5] A provision in a charter of a corporation that, "If the indebtedness of said company shall at any time exceed the capital stock paid in the directors assenting thereto shall be individually liable to the creditors for said excess," has been held by the Tennessee Supreme Court to impose an individual liability upon them for such specific debts only as were con-

[1] Metzger *v.* Carr, (1894) 79 Hun, 258; s. c., 29 N. Y. Supp. 410.

[2] Ibid.

[3] State Bank *v.* Andrews, (Ct. Com. Pl. N. Y. 1893) 2 Misc. Rep. 394; s. c., 21 N. Y. Supp. 948; Merritt *v.* Goodrich, (Ct. Com. Pl. 1893) 2 Misc. Rep. 578; 21 N. Y. Supp. 949.

[4] King *v.* Union Iron Co., (1891) 58 Hun, 601; s. c., 11 N. Y. Supp. 603.

[5] Ibid.

tracted with their assent in excess of the paid-up capital and remain unpaid after the corporate assets are exhausted.[1]

§ 237. **Liability under provisions of charter — Pennsylvania.**—The charter of a Pennsylvania corporation provided that if the directors failed to make an annual statement of the nature and character of the property of the association, or if they made a false statement, they should be liable for the debts of the corporation. The directors made no statement for three years. They then published a statement, in lumping items only, on the face of which the company was solvent. As a matter of fact the company was insolvent at the time, and two days afterwards a receiver was appointed. In an action against the directors, they filed an affidavit of defense in which they averred that they had made the statement with ordinary care and prudence, and in the belief that the association was solvent. This affidavit of defense was held by the Supreme Court of Pennsylvania to be insufficient to prevent judgment, as the delay in making the statement and its defective character brought the directors within the personal liability clause of the charter.[2]

[1] Allison *v.* Coal Company, (1888) 3 Pickle, (Tenn.) 60; s. c., 9 S. W. Rep. 226. A case illustrating the circumstances under which a by-law of a corporation making the director liable for creating an indebtedness exceeding the amount of the subscribed capital stock would be held to have been waived: Underhill *v.* Santa Barbara Land, Building & Imp. Co., (1891) 93 Cal. 300; s. c., 28 Pac. Rep. 1049.

[2] Githers *v.* Clarke, (1893) 158 Pa. St. 616; s. c., 28 Atl. Rep. 232; 33 W. N. C. 462. The court said: "It is quite clear that their belief that the corporation was solvent was no excuse for their failure to make an earlier statement, and that 'ordinary care and prudence' in making it when they did cannot relieve them from the liability incurred by their delay. They were chargeable with knowledge of the condition of the association, and they ought to have made a true and intelligible statement of it in conformity with the act of assembly. It was a duty the association owed to the public, and the default of their predecessors should have hastened their performance of it. But they neglected to make any statement for three months, and until the association was about to pass into the hands of a receiver, and when they did make one it was defective. It did not set forth with reasonable particularity the 'nature and character of the property of the corporation.' It represented the association as solvent, when in fact it was not able to pay more than ten per cent of its liabilities. It may be true that the directors believed the corporation was solvent, and that the assets were as valuable as represented, but it is very evident that their belief was not warranted by the facts nor consistent with the knowledge of its affairs which the law imputes to them."

§ **238. Statutory liability — California statutes.**—To make directors of a corporation personally liable under the provision of the Civil Code of California that "the directors of corporations must not * * * create debts beyond the subscribed capital stock * * *," and then affixes a liability upon them for its violation to the full amount of the debt contracted, it must appear that the corporation must have been indebted at the same time in an aggregate amount exceeding the amount of the capital stock. This statute has been held a penal one and subject to a strict construction against the liability. Under that construction the prohibited debts have been held to be ordinary subsisting debts in excess of the capital stock, and not the aggregate of the debts of the company created during its entire corporate existence. The prohibition applies to debts in excess of all the subscribed capital stock, whether it has all been paid in or only part of it, and regardless of the disposition which may have been made of it. A purchase of mines for the full amount of the capital stock, to be paid for in the stock of the corporation, a portion of which only is paid in, does not make all debts thereafter created in excess of the subscribed capital stock. The subscribed capital stock of a corporation is the fund upon which the transactions of the corporation are to be made, and is a guaranty to creditors that all obligations to that amount will be met; but it cannot be considered as a debt of the corporation, whether paid in or not, in estimating the amount of indebtedness beyond which the directors of the corporation may make themselves personally liable. Debts to be thus considered are only those created by voluntary act of the directors.[1] The directors of a mining corporation are not rendered liable for the penalty imposed by the statute of California requiring the directors of such corporations, on the first Monday of each and every month, to post in the office of the corporation a verified balance sheet for the previous month, and providing that upon their failure so to do they shall be liable in an action by any stockholder in the penal sum of $1,000 for each failure to comply with its requirements. It would seem that under the provisions of the statute the stockholder or stockholders might, at their election, proceed against the directors for a single delinquency, or might forbear to do so until more than one dereliction of duty on the part of their trustees had occurred, but in neither

[1] Moore *v.* Lent, (1889) 81 Cal. 502; s. c., 22 Pac. Rep. 875.

event could more than one penalty be recovered.[1] The statute of California requiring the directors and officers of mining corporations to make and post an account or balance sheet on the first Monday of each month has been held to be mandatory, and the officers and directors of such corporations must be presumed to know at all times the condition of the business and property under their control, and in the absence of a showing of impossibility to have made and posted the account as required, they cannot avail themselves of any presumption that their duty has been performed. Nor can they relieve themselves from liability to a stockholder for liquidated damages under the statute by showing that the account was posted after the time required by law and the day before the commencement of the action.[2]

§ 239. **Statutory liability — Colorado statutes.**— The directors of a corporation, coming into office after an indebtedness has been created against it, and after the previous board's default in failing to file, as required by the statutes of Colorado, a report showing the amount of the corporate indebtedness, will not be held liable under the general statute which provides "that all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should * * * have been made and filed, and until such report shall be made."[3] A complaint against directors of a corporation to enforce their liability under the statutes of Colorado which makes directors and trustees of corporations "liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should by this section have been made and filed and until such report shall be made," referring to the annual report of the amount of its capital and the proportion actually paid in, etc., must aver the contract of indebtedness, the default of the corporation and the directorship of the defendants, and as of such dates to show the liability of the defendants under the statute.[4]

[1] Loveland *v.* Garner, (1887) 71 Cal. 541; s. c., 12 Pac. Rep. 616.

[2] Schenck *v.* Bandmann, (1889) 81 Cal. 231; s. c., 22 Pac. Rep. 654.

[3] Austin *v.* Berlin, (1889) 13 Colo. 198; s. c., 22 Pac. Rep. 433; citing Boughton *v.* Otis, 21 N. Y. 261; Quarry Co. *v.* Bliss, 27 N. Y. 299.

[4] Anfenger *v.* Anzeiger Pub. Co., (1866) 9 Colo. 377; s. c., 12 Pac. Rep. 400. As to construction of the Colorado statutes imposing liability upon

§ **240. Statutory liability — Iowa statutes.**— It must appear, in order to render officers of a corporation liable under the statutes of Iowa for diversion of funds or paying dividends so as to leave insufficient funds to meet liabilities, that the entire property of the corporation is not sufficient to pay its indebtedness.[1] The word "liability" in this statute means existing indebtedness, the payment of which can be enforced. It does not include corporate liability for payments of capital stock, the liability being remote and contingent.[2] There being sufficient assets in the possession of a corporation to pay all its debts at the time a dividend is declared, the payment of a dividend will not be held illegal on a diversion of funds to objects other than those authorized.[3] The statutory provision in Iowa that intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public, that any person who has sustained injury from such fraud may recover damages against those guilty of participating in the fraudulent act, only applies to officers or others guilty of intentional fraud. Hence, in an action to recover from individual officers of a corporation the amount of a judgment against the corporation on the ground that such officers, have rendered themselves liable by fraud, they will be relieved from liability by a proof of the absence of intentional fraud and diversion of assets to their own use.[4] In an action for damages under this statute, the particular respect in which there was a failure to comply with the articles of incorporation resulting in damages to the complainant, or the particular act of deception, must be specified.[5] Under the statute of Iowa making the directors of a railroad company receiving taxes in aid thereof liable to any of its stockholders in double the amount of the par value of his stock in the event of their voting to bond or mortgage the road to exceed certain fixed amounts per mile, the Supreme Court of Iowa held that no liability on the part of the directors arose where such an incumbrance was voted prior to the voting of the tax, and the mortgage was executed and recorded before the tax in aid of the railroad was collected and paid to the company.[6]

officers of corporations for failure to make certain annual reports, and for signing a false report knowing it to be false, see Matthews *v.* Patterson, (1891) 16 Colo. 215; s. c., 26 Pac. Rep. 812.

[1] Miller *v.* Bradish, 69 Iowa, 278.

[2] Ibid.

[3] Ibid.

[4] Hoffman *v.* Dickey, 54 Iowa, 135.

[5] White *v.* Hosford, 37 Iowa, 566.

[6] Walker *v.* Birchard, (1891) 82 Iowa, 388.

§ 241. Statutory liability — Massachusetts statutes.— The statute of Massachusetts makes the officers of a corporation jointly and severally liable for the debts of the corporation in case there are false statements in the certificate of the condition of the corporation which they are required by law to make at certain stated times.[1] A tax is a debt within the meaning of that statute.[2] The directors and officers signing a certificate of the condition of the corporation, knowing it to be false, are liable for the debts of the corporation then existing, as well as for debts incurred thereafter.[3] But under this Massachusetts statute directors cannot be made liable for the debts of a corporation, unless the certificate required by law be willfully false.[4] Debts due from a corporation to one of the directors are debts within the meaning of the Massachusetts statute making the president and directors of a corporation liable to the extent of the excess of its debts over its capital.[5] On a bill brought to enforce this liability by a judgment creditor, the plaintiffs may prove, not only their judgment debt, but a further sum due them on simple contract.[6] Where the debts of the corporation exceed the capital a director of the corporation, who is also a creditor, cannot share with other creditors, who are not directors, in the amount which he, or he

[1] Pub. St. Mass. chap. 106, §§ 54, 60.

[2] Felker *v.* Standard Yarn Co., (1889) 148 Mass. 226; s. c., 19 N. E. Rep. 220.

[3] Ibid. It was said by the court: "And no doubt one important reason, perhaps the principal reason, for the statutory provisions is to enable persons who may have occasion to deal with corporations to ascertain their condition, and their title to credit, so that a person whose debt already exists at the time of the filing of the certificate certainly has not, by any false statements contained therein, been misled into giving credit to the corporation, and may not in any way be injured thereby. But in imposing the penalty of liability for its debts and contracts, the statute is not limited to such debts and contracts as were created in favor of persons who had examined and been misled by the false certificate, as it should be if the idea of the defendant were followed out. It is not even limited to debts and contracts which come into existance after the filing of the certificate, but is general in its terms, and provides that the officers who knowingly make the false certificate 'shall be jointly and severally liable for its debts and contracts.' Pub. St. Mass., chap. 106, § 60. The construction of this language includes existing debts and contracts, and we find nothing elsewhere sufficient to show that the legislature meant otherwise."

[4] Felker *v.* Standard Yarn Co., (1889) 150 Mass. 264; s. c., 22 N. E. Rep. 896.

[5] Thacher *v.* King, (1892) 156 Mass. 490; s. c., 31 N. E. Rep. 648.

[6] Ibid.

and other directors, may be compelled to pay towards the debts of the corporation in consequence of such excess under this statute.[1] The statute of Massachusetts making officers of corporations jointly and severally liable for the debts thereof, when they exceed the capital, "to the extent of such excess existing at the time of the commencement of the suit against the corporation upon the judgment in which the suit in equity to enforce such liability is brought," has had the consideration of the federal court for the district of Vermont, and the court construed the statute and held the liability under it, before suit brought to fix it, not to be a debt, nor any fixed obligation to pay, but only that from which, by the prescribed course, an obligation to pay might be raised.[2]

§ 242. **Statutory liability — Minnesota statutes.**— There is a statute in Minnesota to this effect: "If any corporation organized and established under the authority of this act shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation, shall be jointly and severally liable in an action founded on this statute for all debts contracted after such violation as aforesaid."[3] The Supreme Court of Minnesota held that the *ultra vires* acts of the directors of the corporation in the case before them in executing accommodation paper in the name of the corporation, and in lending the funds of the corporation to others, constituted a

[1] Ibid.; citing Potter *v.* Stevens Machine Co., 127 Mass. 592; Thayer *v.* Union Tool Co., 4 Gray, 75, 79; Merchants' Bank *v.* Stevenson, 10 Gray, 232; Cambridge Water Works *v.* Somerville Dyeing & Bleaching Co., 4 Allen, 239; Merchants' Bank *v.* Stevenson, 5 Allen, 398, 401, 402, and 7 Allen, 489; First National Bank *v.* Hingham Manufg. Co., 127 Mass. 563.

[2] Knower *v.* Haines, (1887) 31 Fed. Rep. 513. WHEELER, J., said: "No liability of officers or stockholders of a corporation exists at common law, but only by statutes of the sovereignty creating it. When so created, it exists only as created, and can be enforced only as provided by such statutes when they make provision for that purpose. Pollard *v.* Bailey, 20 Wall. 520; Fourth National Bank *v.* Francklyn, 120 U. S. 747; s. c., 7 Sup. Ct. Rep. 757. Such a liability under a statute like this, before suit brought to fix it, is not a debt, nor any fixed obligation to pay, but is only that from which, by the prescribed course, an obligation to pay may be raised. Ripley *v.* Sampson, 10 Pick. 371; Bangs *v.* Lincoln, 10 Gray, 600. This is different from cases where the law raises the liability from the acts of the officers or stockholders and leaves it to be enforced by the appropriate remedy. Windham Provident Inst. *v.* Sprague, 43 Vt. 502."

[3] Laws Minn. 1873, chap. 11, § 23 (Gen. Sts. Minn. 1878, chap. 34, § 142.)

violation of the statute "by the corporation" within its meaning. As to the "assent" required to make a director liable, they held that to constitute "assent" there must be something more than mere negligence on the part of a director in not knowing what, in the exercise of proper care, he ought to have known. There must be some willful or intentional violation of duty — assenting to it, knowing that the act is being or about to be done. But if, with such knowledge, he neither objects to nor opposes it when his duty requires, and when he has the opportunity of doing so, this would be "assent." Further, if a series of acts or a continuous course of conduct on the part of the directors, in violation of the statute, finally producing the insolvency of the corporation, is begun before the debt of a creditor is contracted, the debt is one contracted "after such violation," although the series of acts or course of conduct is not completed or the insolvency of the corporation consummated until afterwards.[1] These rules were declared as to actions to enforce this liability under the statute, to wit: A creditor of the corporation may sue one or more of the directors to enforce the liability without joining all the creditors to whom they are liable, or all the directors subject to the liability. His right of action is neither taken away nor suspended by the fact that the affairs of the corporation may have been placed in the hands of a receiver. Nor is it necessary that the creditor sue the corporation and obtain judgment against it before suing the directors. The corporation, if necessary, may be joined as co-defendant with the directors, and the creditor may establish his claim against the corporation in the same action.[2]

§ 243. **Statutory liability — Missouri statutes.**— The Supreme Court of Missouri has held that under the statute of that state making directors of corporations, where they have allowed the debts of the corporation to exceed the amount of capital stock paid in, jointly and severally liable to the extent of such excess for all debts of the corporation then existing, and for

[1] Patterson *v.* Stewart, (1889) 41 Minn. 84; s. c., 42 N. W. Rep. 926.

[2] Ibid. The court commented upon the following cases which are of different kinds to enforce liability of stockholders and officers: Dodge v. Minnesota Plastic Slate Roofing Co., 16 Minn. 368; Merchants' National Bank *v.* Bailey Manufacturing Co., 34 Minn. 323; s. c., 25 N. W. Rep. 639; Allen *v.* Walsh, 25 Minn. 543; Johnson *v.* Fischer, 30 Minn. 173; s. c., 14 N. W. Rep. 799; Bassett v. St. Albans Hotel Co., 47 Vt. 313; Hornor *v.* Henning, 93 U. S. 228.

all that should be contracted so long as they continued in office, etc., were liable in an action to recover a debt contracted under such circumstances, notwithstanding one of the firm owning the debt was a stockholder in the corporation.[1] The debts for which directors of a corporation will be held liable under this Missouri statute are the debts voluntarily incurred by the directors.[2] A judgment against a corporation for damages for a loss of a steamboat, for instance, through the negligence of the agents and servants of the corporation would not be one of the debts contemplated by the statute.[3]

§ 244. Statute of New York — liability for failure to file annual report.—Under the statutes of New York, making the directors of certain corporations liable for the debts of the corporation in case they fail to file with the secretary of state the

[1] Anderson *v.* Blattau, 43 Mo. 42. The court distinguished Kritzer *v.* Woodson, 19 Mo. 327, in these words: "That was a case where a stockholder in a corporate company sued the directors to recover back an amount which he had been compelled to pay to the creditors of the company. The law made him liable to the extent of double the amount of stock in the company. Its entire assets having been exhausted, he was compelled to pay the creditor of the company the amount which he sought to recover in that suit upon the ground that the debts of the corporation had been suffered to accumulate to an amount in excess of the capital stock actually paid in. But the court said this statute was given for the protection of creditors and not the individual members of the company. It is true that for any improper management of the affairs of the company, by which a liability might be incurred on the part of the directors to the individual members, an action could be maintained against them. Such liability, however, exists independent of this statute. It is clear that the point decided in that case was that the statute was intended for the protection of such parties as really held debts against the company. The stockholder, by discharging an obligation which the law imposed upon him, could not make himself the creditor of the corporation. His claim was in no sense a debt due by the company, and hence it was not covered by the provisions of a statute made for a different purpose altogether. This [claim in suit here] seems to have been a debt contracted by the company in the prosecution of its business, and the liability of the defendants cannot be affected by the fact that one of the plaintiffs was a stockholder. Certainly the interests of his copartner ought not to suffer on account of his relation to the corporation. The objection differs in no essential particular from any other incurred by the company; and if it was due and owing to the stockholder alone, we can see no good reason for depriving him of the protection intended to be given to all creditors alike."

[2] Cable *v.* Gaty, 34 Mo. 573, affirming Cable *v.* McCune, 26 Mo. 371.

[3] Cable *v.* Gaty, 34 Mo. 573, affirming Cable *v.* McCune, 26 Mo. 371.

annual report required as to the amount of its capital stock and the proportion actually paid in, the amount, and, in general terms, the nature of its existing assets and debts, and the names of its then stockholders, and the dividends, if any, declared since the last report,[1] the directors become liable for all the debts of the corporation during the term of directorship if they fail to make and file the report. So long as the default lasts, the other essentials existing, there is no distinction between directors in office at the time of default and those subsequently elected. An incoming director, having the power to protect himself from liability by filing a report, his failure to do so imposes a liability for debts contracted during his term.[2] Where there is proof in such a case that there was a corporation which assumed to act and carry on business, having a general manager, directors and by-laws, the directors against whom the action is brought cannot defend on the ground that there was no legally organized corporation.[3] Operating as a penalty, a recovery cannot be had of the trustees for failure to file a report under such statutes, in case the statute be repealed, expressly or by implication, before the trial of the case.[4] Creditors residing in other states than New York have the same rights as resident creditors to enforce the liability of the trustees for failing to make the required annual report under this statute.[5] In a case where the number of trustees of a manufacturing corporation organized under the laws of New York had been practically reduced to nine from twelve, and the annual report required to be filed had been signed by six of the trustees, it was claimed that the trustees had become liable for the debts of the corporation as a penalty for not filing the report, inasmuch as the report filed had not been signed by a majority of twelve trustees. The New York Court of Appeals held that the law had

[1] Laws N. Y. 1875, chap. 611, § 18.

[2] Buck *v.* Barker, (Buffalo Super. Ct. Spl. Term, 1887) 5 N. Y. St. Repr. 826; citing Jones *v.* Barlow, 62 N. Y. 202; Cameron *v.* Seaman, 69 N. Y. 396, 402; Boughton *v.* Otis, 21 N. Y. 261; Garrison *v.* Howe, 17 N. Y. 464, 465; Quarry Co. *v.* Bliss, 27 N. Y. 297–300; Chandler *v.* Hoag, 2 Hun, 613; affirmed in 63 N. Y. 624.

[3] Buck *v.* Barker, (Buffalo Super. Ct. Spl. Term, 1887) 5 N. Y. St. Repr. 826; citing Buffalo & Allegany Railroad *v.* Cary, 26 N. Y. 75; Aspinwall *v.* Sacchi, 57 N. Y. 331–338; Meriden Tool Co. *v.* Morgan, 1 Abb. N. C. 125, note.

[4] Victory Webb Printing Co. *v.* Beecher, (1881) 26 Hun, 48; affirmed in 97 N. Y. 651; followed in Carr *v.* Risher, (1888) 50 Hun, 147.

[5] Sears *v.* Waters, (1887) 44 Hun, 101.

been complied with in filing this report; that the proceedings of the board, in the matter of reducing the number of members, concurred in by all having an interest in the corporation, effected a practical reduction, and constituted the nine thereafter elected a *de jure* as well as a *de facto* board. Further, that it seemed that the question of the legality of the change in the constituency of the board could only be raised in a direct proceeding by one whose interests were affected. And the trustees as constituted having complied with the letter and spirit of the law, in filing the report, it was not competent in this action against them to enforce a liability for non-compliance with the statute for plaintiff to show that some of the acting trustees were not elected or for some reason were disqualified from acting, or to claim that, by reason of a non-performance or an irregularity in the performance of some prior duty enjoined upon the stockholders, the board as constituted had no authority to perform the general duties required of them as agents of the corporation.[1] In a case before the New York Court of Appeals it appeared that an annual report was properly made out and signed by the trustees of the corporation in the time required by the statute, but by inadvertence or mistake of the secretary was not filed in time. Within a month afterwards there was an application made to the Supreme Court for leave to file it and an order of the court that it be filed *nunc pro tunc*. The Court of Appeals held that this order of the court did not of itself relieve the trustees sued from liability; that the duty to file the report was imposed by statute upon the corporation, and over it the court had no jurisdiction. The application was an act by the trustees in supposed furtherance of their duty and was an indication of good faith in respect to the proper disposition of the report, being an effort to do that which the corporation had not done.[2] Under the construction of this section of the statute, in Cameron *v.* Seaman,[3] where it was held that the limitation of twenty days applied only to the act of making, and did not apply to the act of filing or publishing; that, as to those acts, the section was directory, but as the object of the act was to insure a speedy and public disclosure of the contents of the report, it was said that the law, in the absence of an express pro-

[1] Wallace & Sons *v.* Walsh, (1890) 125 N. Y. 26; s. c., 25 N. E. Rep. 1076.

[2] Butler *v.* Smalley, (1886) 101 N. Y. 71.

[3] 69 N. Y. 396.

vision on the subject, implies that both filing and publication should be within a reasonable time after the twenty days, and that this requirement exacted prompt performance and diligent action on the part of the trustees, the Court of Appeals held that in this case the referee erred in refusing to find that whether the filing of the report was within a reasonable time after the expiration of the twenty days would depend upon the circumstances; also, that he erred in finding that there was neither prompt performance nor diligent action on the part of the company with respect to the filing of the report.[1] Where the certificate of incorporation was signed by seven trustees and acknowledged by nine, the provision of the statute which requires an annual report to absolve the trustees from personal liability for the debts of the corporation to be signed by a majority of the trustees would not be satisfied by an annual report signed by two trustees, where it is not shown by an official record that neither one of the trustees had resigned.[2] A manufacturing corporation which has never commenced business, and where, before the time prescribed for making the report required under the statute has elapsed, the object for which the corporation was formed becomes impossible of accomplishment by it, and it is neither able nor intends at any time to prosecute

[1] Butler *v.* Smalley, (1886), 101 N. Y. 71, revg. 49 N. Y. Super. Ct. 492. DANFORTH, J., said: "To prepare a report for filing and publication, to place it in good faith in the hands of the secretary for deposit in the clerk's office and in the office of a newspaper, is at least equal in significance to a delivery of a report to a mail agent for transmission to those places. In the one case as in the other the company avails itself of the usual methods of performing its duty, and in the absence of anything to show the want of good faith and active diligence in respect thereto on its part, a trustee, when no time is fixed by statute within which an act shall be performed, should not be subjected to a penalty, provided the thing required is actually done at a reasonable time, having regard to the nature and circumstances of the performance."

[2] Westerfield *v.* Radde, (1884) 67 How. Pr. 204. In Whitney *v.* Cammann, (1892) 60 N. Y. Super. Ct. 391; s. c., 18 N. Y. Supp. 200; affirmed in Whitney *v.* Cammann, (1893) 137 N. Y. 342; s. c., 33 N. E. Rep. 305, the court referred to Cameron *v.* Seaman, 69 N. Y. 396, and Butler *v.* Smalley, 101 N. Y. 72; s. c., 4 N. E. Rep. 104, and held that while these cases held that substantial instead of literal compliance with the requirement as to the filing of the annual report, as where the report was filed within a few days after the prescribed time, yet the failure to comply with the statute for a year clearly brought the trustees in this case within the mischief of the statute and subjected them personally to the liability imposed by the statute.

its business, is not required to make such a report, and no liability under the statute attaches to the trustees for failure to make it.[1] The statutes of New York making the trustees of manufacturing corporations liable for the debt of the corporation for failure to file an annual report, it has been held that the liability does not depend upon the fact that defendant was a trustee when the debt was incurred, but upon his having been a trustee when the default in filing the report occurred. So where one may have resigned after the incurring of the debt, but before the default complained of, he would not be held liable.[2] A report made by the trustees of a manufacturing corporation, as required by the statute, stating the amount of the capital, and that all of it had "been paid in in cash, patent rights, merchandise, machinery accounts, etc., necessary to the business and for which stock to the amount of the value thereof has been issued by the company," has been held by the Court of Appeals to be a sufficient compliance with the requirement of the act; further, that it is not necessary, in the annual report required to be filed by the trustees under this statute, to specify therein how much of the capital stock was paid in in cash and what amount in property.[3]

§ 245. **Actions to enforce this liability.**— Under this statute the action may be brought against such of the trustees as the plaintiff may select; and if there are three or more such trustees, for instance, and the action be brought against two, the non-joinder of the others would not constitute a defense.[4] In case a defendant in such an action be a trustee whose election is not legally valid, where, as matter of fact, he was in form elected a trustee by those who had the right to elect one, if there was a vacancy to be filled, and thereafter acted as trustee, and while acting as such there was a failure to make and file the report required by the statute, the court held him liable on any such default between the time of his election and his resignation; also

[1] Kirkland *v.* Kille, (1885) 99 N. Y. 390.

[2] Bruce *v.* Platt, (1880) 80 N. Y. 379. As to this statute being a penal statute, see Merchants' Bank *v.* Bliss, 35 N. Y. 412; Garrison *v.* Howe, 17 N. Y. 458; Adams *v.* Mills, 60 N. Y. 536, 553; McHarg *v.* Eastman, 35 How. Pr. 205; s. c., 7 Robt. 137.

[3] Whitaker *v.* Masterton, (1887) 106 N. Y. 277, holding the action against the trustees not maintainable. Citing Bonnell *v.* Griswold, 80 N. Y. 128, 135; Brackett *v.* Griswold, 103 N. Y. 425.

[4] Halstead *v.* Dodge, (1884) 51 N. Y. Super. Ct. 169; s. c., 1 How. Pr. (N.S.) 170; citing Strong *v.* Sproul, 4 Daly,

that he was not exempted from liability by reason of his not being a stockholder.[1] In an action under this statute brought against several trustees to enforce their liability for failure to make the annual report as required for a debt of the corporation, where there is a failure to serve one or more of the defendants the case may proceed against those served, as the action is upon a joint and several liability and for a penalty, and not upon the contract.[2] This statute is penal, and not to be extended by construction. In an action to enforce a liability created by it, nothing can be presumed against the trustees sought to be charged, but every fact necessary to establish their liability must be affirmatively proved.[3] The failure to file a report making the trustees jointly and severally liable for all the debts of the corporation, the fact that the corporation may be indebted to a trustee would not be a defense to the action.[4] In an action against the trustees of a corporation to charge them with an indebtedness of the corporation, and on the trial there be proved the original indebtedness, and that it had been reduced to judgment, and the execution upon the judgment returned unsatisfied, the trustees would not be concluded in any respect by the judgment against the corporation, they being neither parties nor privies to the action, and should be allowed to prove any defense arising subsequent to the accruing of the debt.[5]

326; Quigley *v.* Walter, 2 Sweeny, 175.

[1] Ibid.

[2] Geisenheimer *v.* Dodge, (1884) 1 How. Pr. (N. S.) 264.

[3] Bruce *v.* Platt, (1880) 80 N. Y. 381; followed in Tovey *v.* Culver, (1887) 54 N. Y. Super. Ct. 404. See, also, Miller *v.* White, 50 N. Y. 137; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62. As to not being necessary to obtain a judgment against the corporation before action against trustee, see Green *v.* Easton, (1893) 74 Hun, 329; s. c., 26 N. Y. Supp. 553. As to pleading in actions against trustees for failing to file annual report under the New York statute, see Wilson Manufacturing Co. Schwind, (N. Y. Sup. Ct. Spl. Term, 1893) 5 Misc. Rep. 205; Straus *v.* Sage, (N. Y. Com. Pl. Spl. Term, 1893) 5 Misc. Rep. 255; Smith *v.* Sage, (N. Y. Super. Ct. Spl. Term, 1893) 5 Misc. Rep. 257.

[4] Morey *v.* Ford, (1884) 32 Hun, 446.

[5] Kraft *v.* Coykendall, (1884) 34 Hun, 285; citing Miller *v.* White, 50 N. Y. 137; Stephens *v.* Fox, 83 N. Y. 317; Rorke *v.* Thomas, 56 N. Y. 565; Jones *v.* Barlow, 62 N. Y. 202–205. Dissenting opinion of DANIELS, J., in Tyng *v.* Clarke, 9 Hun, 274; Esmond *v.* Bullard, 16 Hun, 67; affirmed in 79 N. Y. 404; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62. As to judgment against corporation prior to suit to enforce personal liability of directors not being necessary, see Strauss *v.* Trotter, (Com. Pl. N. Y., 1894) 6 Misc. Rep. 77; s. c., 26 N. Y. Supp. 20.

§ 246. What are and what are not "debts" for which liability under this statute may arise.— An unliquidated claim, arising out of a breach of contract of employment at the time of the failure of a manufacturing corporation to file the annual report required by the New York statute, is a debt within the meaning of the statute imposing a personal liability upon the trustees for all "debts" of a corporation which fails to file an annual report.[1] And in such an action, upon such a claim, the recovery of the holder of the claim will be limited to the amount of damages he may have recovered from the corporation.[2] The holder of bonds issued by a manufacturing corporation, having knowledge that such bonds were diverted from the purpose for which they were intended and authorized, cannot enforce the liability of trustees for the amount of his bonds as a "debt" within the meaning of this statute.[3] A judgment for costs, recovered against the corporation in an action for trespass brought by it, is such a "debt" within the meaning of the statute as the trustees of the corporation will be liable for in case they fail to file the required report.[4] It *seems*, however, that in such a case it would be open to the trustees sued to show that the recovery of

[1] Green *v.* Easton, (1893) 74 Hun, 329; s. c., 26 N. Y. Supp. 553; citing New Jersey Ins. Co. *v.* Meeker, 37 N. J. Law, 300, 301; Frazer *v.* Tunis, 1 Bin. 254-262; Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 454, 455.

[2] Green *v.* Easton, (1893) 74 Hun, 329; s. c., 26 N. Y. Supp. 553.

[3] Kirkland *v.* Kille, (1885) 99 N. Y. 390.

[4] Allen *v.* Clark, (1888) 108 N. Y. 269, revg. 43 Hun, 377. EARL, J., said: "This judgment clearly was one of the debts which the company was bound to include among its 'existing debts' in the report which it was required to make, file and publish within twenty days after the 1st day of January, 1886. The section requires the report to state the amount of all of its existing debts of every nature, and it is the clear meaning of the section that if such report be not made the trustees shall be personally liable for all debts which the company was thus bound to report. It may be inferred that it was the purpose of the lawmakers to require this report to be made, published and filed for the information, benefit and protection of existing creditors of the company not only, but of all persons who might thereafter enter into contract relations with it. It may also have been the purpose of the lawmakers to require the report from every manufacturing corporation as a check upon extravagance and mismanagement of its affairs by its trustees, by constantly keeping before them the reminder that at least once a year the affairs of the company are to be exposed to the public view. It may also be supposed that the reports were required so that information might be readily obtained by assessors for the purpose of taxation, and by other public officials who might have occasion to supervise the conduct of the corporation, or to proceed against it for any purpose whatever; and, therefore, to

the costs in the action was either collusive or fraudulent. The debt created by the judgment would be proven by the production of the judgment, which would be at least *prima facie* evidence of its existence.[1] There was a contention in this case before the New York Court of Appeals that the words in the clause of the statute, "and for all that shall be contracted for before such report shall be made," limited the meaning of the words, "debts of the company then existing," in the clause preceding it, to such debts of a corporation as are voluntarily contracted. The court held adversely to this contention, and said: "The word 'contracted' here means the same as 'incurred,' and includes every debt for which the corporation becomes bound. There is no apparent reason for any discrimination as to the kind of debts, and we do not think any was intended."[2] Causes of action for breaches of contract, and causes incidentally arising or resulting from such breaches on the part of the corporation, are not "debts" within the meaning of those statutes making trustees liable for debts of corporations for not filing the required annual report.[3] Where a trustee of a corporation owes a debt against it, and assigns it to another absolutely for value, the assignee of such debt, on a default in making and filing a report under the New York statute, subsequently occurring, may proceed against the trustees to recover the debt on their statutory personal liability, notwithstanding the assignor of the debt to him may have continued to be a trustee up to the time of the default.[4] Where the existence of a corporation, by the terms of its certificate, ends, and there is not at that time a debt in favor of another against it, there can be no liability of directors for not filing an annual report, as required,

make sure of the accomplishment of these important purposes, the trustees are made personally liable for all the debts of the company, in case of the failure of the company within the time specified to make the report."

[1] Allen *v.* Clark, (1888) 108 N. Y. 269. The court distinguished Miller *v.* White, 50 N. Y. 137, where the judgment was upon a debt antecedently existing, in which case it was held that the judgment was neither conclusive nor *prima facie* evidence of the debt, and that it was the duty of the plaintiff to prove and establish his debt independently of the judgment, by saying: "The reason upon which that decision is based can have no application to a case like this, where there was no liability on the part of the company to pay the costs antecedently or independently of the judgment."

[2] Allen *v.* Clark, (1888) 108 N. Y. 269, 275.

[3] Victory Webb Printing Co. *v.* Beecher, (1881) 26 Hun, 48; citing Oviatt *v.* Hughes, 41 Barb. 541; Whitney Arms Co. *v.* Barlow, 68 N. Y. 34.

[4] Cornell *v.* Roach, (1886) 101 N. Y. 373.

for what may, at a later date, by the terms of the contract with the corporation, become a debt under that contract.[1] Under the provision of the statute of New York that, for failure to file the annual report of the capital and indebtedness of any corporation, as therein prescribed, the trustees snall be liable for all debts of the corporation then existing, or contracted before such report be filed, the trustees cannot be subjected for an alleged liability of the corporation accruing on an accommodation indorsement, which the corporation, under its charter, had no authority to make and was not bound by.[2] Trustees of a corporation, organized for manufacturing purposes under the statutes of New York, cannot be subjected to an alleged liability of the corporation accruing on an accommodation indorsement which, under its charter, it had no authority to make, and which, consequently, did not bind it.[3] Where the annual report required to be filed under the New York statute before January twentieth has been filed before the maturing of a note which has been indorsed by a corporation for the accommodation of the maker, there will be no liability of the trustees growing out of the accommodation indorsement for the failure to file the report. This being a conditional liability, it was never incurred, and created no liability before it matured.[4] A contract obligation to pay a singer employed for a specified time by the corporation at a specified salary, is a "debt" of the corporation from the time the contract goes into effect, within the meaning of this statute, for which a director may become liable.[5]

§ 247. A United States Supreme Court decision on this subject.— There was an attempt in an action which came before the Supreme Court of the United States to recover of the trustees of a corporation the amount of a judgment against the corporation under the provisions of the statute of the state of New York,

[1] Gold *v.* Clyne, (1890) 58 Hun, 419; s. c., 12 N. Y. Supp. 531; affirmed in Gold *v.* Clyne, (1892) 134 N. Y. 262; s. c., 31 N. E. Rep. 980. For another illustration of circumstances as to the debt under which the trustees could not be held liable, see Sherman *v.* Slayback, (1890) 58 Hun, 255; s. c., 12 N. Y. Supp. 291. Also, Chapman *v.* Comstock, (1890) 58 Hun, 325; s. c., 11 N. Y. Supp. 920.

[2] National Park Bank *v.* Remsen, (1890) 43 Fed. Rep. 226.

[3] Ibid.

[4] Witherow *v.* Slayback, (1895) 11 Misc. Rep. 526; s. c., 32 N. Y. Supp. 746.

[5] Brandt *v.* Godwin, (1889) 3 N. Y. Supp. 807.

whereby trustees of corporations formed for manufacturing, mining, mechanical or chemical purposes are made liable for debts of the corporation on failure to file the reports of capital and of debts required by that section of the statute. The Supreme Court held that the provision of the statute under which the liability of the trustees, it was claimed, existed on account of a failure to file such a report, was penal in its character, and that it must be construed with strictness as against those sought to be subjected to its liabilities; and, upon this rule of construction, the judgment roll was not competent evidence to establish a debt due from the corporation to the plaintiff; further, it was held that a claim in tort against a corporation found under that statute, as amended, was not a debt of the corporation for which the trustees might become liable under the provisions of the statute above stated.[1]

[1] Chase *v.* Curtis, (1885) 113 U. S. 452; s. c., 5 Sup. Ct. Rep. 554. Mr. Justice MATTHEWS, in the opinion, speaking for the court, said: "It is the well-settled rule of decision, established by the Court of Appeals of New York in numerous cases, that this section of the statute, to enforce which the present action was brought, is penal in its character and must be construed with strictness as against those sought to be subjected to its liabilities." Merchants' Bank *v.* Bliss, 35 N. Y. 412; Wiles *v.* Suydam, 64 N. Y. 173; Easterly *v.* Barber, 65 N. Y. 252; Knox *v.* Baldwin, 80 N. Y. 610; Veeder *v.* Baker, 83 N. Y. 156; Pier *v.* George, 86 N. Y. 613; Stokes *v.* Stickney, 96 N. Y. 323. In the case last cited the action authorized by it was held to be *ex delicto*, and that it did not survive as against the personal representative of a trustee sought to be charged. In Bruce *v.* Platt, 80 N. Y. 379, it was said: "It is settled by repeated decisions applicable to this case that the statute in question (Laws N. Y. 1848, chap. 40, § 12) is penal and not to be extended by construction; that in an action to enforce a liability thereby created, nothing can be presumed against the defendants, but that every fact necessary to establish their liability must be affirmatively proved." Citing Garrison *v.* Howe, 17 N. Y. 458; Miller *v.* White, 50 N. Y. 137; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62. This rule of construction in reference to this and similar statutory provisions has been heretofore adopted and applied by this court. Steam Engine Co. *v.* Hubbard, 101 U. S. 188; Flash *v.* Conn, 109 U. S. 371. In the case last mentioned, this court, following the Court of Appeals of New York in the case of Wiles *v.* Suydam, 64 N. Y. 173, showed the distinction between the liability of stockholders for the debts of the corporation, under a section of the same act, making them severally individually liable for the debts and contracts of the company to an amount equal to the amount of stock held by them respectively, until the whole amount of the capital stock fixed and limited by the company had been paid in, and the liability imposed upon the trustees by the section now under discussion. It was held that the former was a liability *ex contractu*, enforceable beyond the jurisdiction of the state, and that the statute should be con-

§ 248. Statute of New York — liability for creation of debts in excess of capital stock.— Under the New York statute making the trustees of manufacturing corporations who assent to the creation of an indebtedness exceeding the amount of the capital stock personally liable for the excess,[1] the liability

strued liberally in furtherance of the remedy; that the latter was for the enforcement of a penalty, and subject to all rules applicable to actions upon statutes of that description. The distinction is illustrated and enforced in Hastings *v.* Drew, 76 N. Y. 9, and Stephens *v.* Fox, 83 N. Y. 313. The present question involved here was decided by the Court of Appeals of New York in the case of Miller *v.* White, 50 N. Y. 137. In that case the complaint set forth the recovery of a judgment against the company, but not the original cause of action against it on which the judgment was founded. The defendant moved for a dismissal on this ground, which was refused, and judgment was rendered in favor of the plaintiff on the production in evidence of the judgment roll. This was held to be erroneous on the ground that the judgment was not competent as evidence of any debt due from the corporation, and that no action could be maintained thereon against the trustees under this section of the act. Judge Peckham, delivering the unanimous opinion of the court, said: "It will be perceived that this is a highly penal act, extremely rigorous in its provisions. It is absolute that the trustees shall be liable for all the debts of the company, if the report be not made, no matter by whose default. If one of the trustees did all in his power to have it made, yet if the president, or a sufficient number of his co-trustees to constitute a majority declined to sign it, or if the president and secretary declined to verify it by oath, the faithful trustee seems to be absolutely liable as well as those who refuse to do their duty." It was accordingly held "that, as against these defendants, the judgment did not legally exist, as they were neither parties nor privies to it. * * * 'It is not a judgment as to those defendants; no action could be maintained thereon against them, * * * nor is the judgment *prima facie* evidence of the debt as against the defendants.'" This doctrine was repeated and reaffirmed by the same court in Whitney Arms Co. *v.* Barlow, 63 N. Y. 62–72. In that case the court said: "The debt must be proved by evidence competent against the defendants. The facts upon which the debt is founded must be proved. The naked admissions of the corporation or judgment against the corporation are not evidence against the trustees. They are *res inter alios acta;* but, when facts are proved which establish the existence of a debt against the corporation, the liability of the trustees for the debt follows upon the proof of the other facts upon which the liability is made by statute to depend." The case of Miller *v.* White, 50 N. Y. 137, has never been overruled nor questioned by the New York Court of Appeals. On the contrary, it has been repeatedly and expressly cited and approved, and either followed or distinguished from the case under decision in the following cases: Rorke *v.* Thomas, 56 N. Y, 559–565; Hastings v. Drew, 76 N. Y. 9–15; Stephens *v.* Fox, 83 N. Y. 313–317; Knox *v.* Baldwin, 80 N. Y. 610–613; Bruce *v.* Platt, 80 N. Y. 379–381.

[1] Laws N. Y. 1848, chap. 40, § 23.

is one of contract and not of penal liability.[1] And the trustees assenting to the creation of indebtedness exceeding the capital stock will be personally and individually liable for such excess to the creditors of the corporation to whom such excess may be owing.[2] In a case before the Supreme Court of New York the

[1] Patterson *v.* Robinson, (1885) 37 Hun, 341. LANDON, J., for the court said: "The assenting trustee, knowing that the indebtedness of the company has reached at least an amount equal to the capital stock, concurs with the company in contracting further indebtedness. He knows that the statute, in case he assents, makes him also liable. He gives his consent and thereby, under the statute, pledges his liability. The statute says to the assenting trustee, 'you may contract as many debts as you choose to become liable for.' It was insisted that the language of section 13 of the act was similar to that of section 23, and, as the liability under the former was, by settled law, a penal one, the same must be true under the latter." Referring to section 13, which makes trustees liable for declaring dividends, the payment of which would make the corporation insolvent, it was said: "The section seeks to deter the trustee from despoiling the company to the profit of the stockholder and to the ruin of the creditors. Such a wrong has no connection with the contracting of the debt, but imperils its payment and the liability affixed upon the offending trustee may well be called a penalty. There is no such flagitiousness in the act of assenting to an excess of indebtedness over the amount of the capital stock. It may be wise and right; at any rate the intent may be honest. Why affix a penalty upon performance of a good act? Such is not the policy of the law. It may lead to reckless speculation, but speculation is no offense, and the statute prudently tempers the venture for gain by making the assenting trustee a partner with the company in the risk of loss, or, more accurately, in liability to such creditor. And, if this view be correct, the creditor for the excess cannot be deprived of his recourse to the assenting trustee by any decrease in the aggregate indebtedness of the company, or otherwise than by his own consent, or by payment to him."

[2] Ibid.; affirming, and reaffirming on a rehearing, Patterson *v.* Robinson, (1885) 36 Hun, 622. The court disguished Hornor *v.* Henning, 93 U. S 228; Merchants' Bank of Newburyport *v.* Stevenson, 10 Gray, 232; Anderson *v.* Speers, 21 Hun, 568. In Patterson *v.* Robinson, (1885) 36 Hun, 622, the court reasoned well to this conclusion, and cited as in harmony with their views Wiles *v.* Suydam, 64 N. Y. 173; Corning *v.* McCullogh, 1 N. Y. 47; Story *v.* Furman, 25 N. Y. 223, and Veeder *v.* Mudgett, 95 N. Y. 295. In Patterson *v.* Robinson, (1885) 37 Hun, 341, they said of their argument in the case *supra*: "We saw that this excess of indebtedness was due by the contract of the company, and, without regard to the statute, indeed wholly independent of the statute, to the creditors to whom the contract of the company made it due. We feel that no statute could deprive such creditor of his contract engagement with the company. Such being the contract relation between the company and such creditor, we thought that when the statute stepped in and added to the contract liability of the company for such excess of indebtedness the personal and individual liability of the

question was whether or not a director of a corporation organized under the statute[1] was liable for a debt of the corporation. Section 18 of that statute requires the filing of an annual report stating the amount of capital, the proportion actually paid in, etc., and provides that the report shall be signed "by the president and a majority of the directors, and shall be verified by oath of the president or secretary of such corporation and filed in the office of the secretary of state; and, if such corporation shall fail so to do, all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made." Section 21 declares that "if any certificate or report made, or public notice given, by an officer of any such corporation shall be false in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." A majority of the court held that a director was an "officer" within the meaning of this last section, and would be liable under it where he had signed a report which was false in a material representation.[2] A trustee not assenting to the creation of an indebtedness in excess of the capital stock of a corporation, his subsequent failure to dissent, when informed of the fact, would not be equivalent to the assent required by this statute.[3] In a case before the Supreme Court of New York, where it was not shown that either of two of the trustees of the corporation during the time in which there was incurred an indebtedness in excess of the capital stock of the corporation, ever attended any of the meetings of the trustees, or were consulted with reference

trustees assenting thereto, it added it to the liability of the company where that liability was placed, namely, to the creditors to whom the company was liable for it. We saw no language in the statute at variance with such a construction, certainly none which seemed to imply that the liability of the assenting trustees for such excess of indebtedness should be diverted from the creditors to whom the company owed such excess, and be devoted to, or conferred upon, or shared among the creditors to whom the company did not owe it. And we had the more confidence in this construction, because of our opinion that section 23, unlike some other sections of the act, did not impose this personal liability as a penalty for wrong done or duty omitted, but as the terms upon which such excess of indebtedness might, with safety to the creditors, be permitted to the company."

[1] Laws N. Y. 1875, chap. 611.

[2] Torbett *v.* Eaton, (1888) 49 Hun, 209; s. c., 1 N. Y. Supp. 614.

[3] Patterson *v.* Robinson, (1885) 36 Hun, 622.

to the management of its business, or participated in its affairs, except to sign its annual reports, and then only upon their faith in the assertions of a co-trustee that they were correct, the court held that no such assent on their part was shown as was required to make them liable under the statute.[1] All the directors who are liable must be made parties to an action brought by a creditor of a corporation to enforce the individual liability imposed by the statute of New York upon the directors of a corporation by whom an indebtedness exceeding the amount of its capital stock is created, such liability being joint and not several.[2] In determining the amount of the liabilities of a corporation, to ascertain whether or not they exceed the amount of the capital stock, a judgment recovered against the corporation by one of its directors for money advanced by him to it, which judgment may have been subsequently assigned by him to a third person, cannot be treated as one of such liabilities.[3]

§ 249. Liability for incurring indebtedness in excess of capital stock — Illinois statute. In an action against directors of a corporation by the holder of notes of the corporation which had been issued under their directorate, based upon their liability for incurring such indebtedness in excess of the limit, as contended, imposed by the following section of the statute of Illinois, to wit: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation," upon the question whether the facts stated in the bill brought the cause of action within the bar of the Statute of Limitations, the contention of the directors was that their liability, if any existed, was for a statutory penalty. The Supreme Court of Illinois held that the liability was not for a statutory penalty, and that the Statute of Limitations was not a bar to a recovery

[1] Ibid. As to what is a properly stated cause of action against directors under the statute of New York (Laws N. Y. 1875, chap. 611, § 22), which imposes a personal liability for an excess of indebtedness, in case the indebtedness of the corporation shall at any time exceed the amount of its capital stock, see Loveland v. Doran & Wright Co., (1891) 61 Hun, 619; s. c., 15 N. Y. Supp. 278.

[2] McClave v. Thompson, (1885) 36 Hun, 365.

[3] Ibid.; citing following: Robinson v. Thompson, 20 N. Y. Wkly. Dig. 557; Easterly v. Barber, 65 N. Y. 255; Knox v. Baldwin, 80 N. Y. 610.

by the creditors of these directors.[1] The same court, in a comparatively recent case have construed this statute, and said: "The liability is created only where the indebtedness of the corporation exceeds the amount of the capital stock, and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors after it has been so contracted as to become binding upon the corporation, should not

[1] Woolverton *v.* Taylor, (1890) 132 Ill. 197. *Arguendo,* it was said: "In the absence of statutory prohibition it is not unlawful for the officers of a corporation to contract debts in excess of its capital stock. Unless restricted by statute, corporations, as individuals, may contract debts to the full extent of their credit, without reference to the amount of their capital stock. Neither is it, under all circumstances, bad management in a corporation to contract debts in excess of the amount of its capital stock. Its assets may be of such value as to give it credit, and warrant the incurring of liabilities far beyond that amount. While statutes in some states, by different forms of language, limit the right of such officers to contract indebtedness beyond prescribed limits, in others no restriction whatever has been enacted, and in many of those in which a limit is prescribed the indebtedness which may be contracted is not limited by the amount of capital stock, but may equal twice or three times that amount. If, therefore, such enactments are to be understood as indicating that it is deemed unwise to allow corporations to incur liabilities beyond a prescribed limit, it must be admitted that the sentiment is by no means harmonious as to where the limit should be placed. These statutes do not, therefore, indicate, as contended by counsel for appellees, that legislatures have considered it bad management in the affairs of a corporation to contract debts beyond the amount of its capital stock. [The quoted section] of our statute does not prohibit the contracting of indebtedness in excess of capital stock; neither does it in terms inflict a penalty for so doing. Therefore, a prohibition cannot be implied, and to say, as counsel insist should be done, that the assenting is made unlawful by the infliction of a penalty, is to assume the very question controverted. While it is true that statutes of other states making officers of corporations individually liable for contracting debts beyond a prescribed limit have been held to be penal, the language of those statutes will be found materially different from ours, and so far as we have been able to ascertain expressly prohibit the incurring of liabilities beyond certain limits fixed. In Hornor et al. *v.* Henning et al., 93 U. S. 228, the Supreme Court of the United States, in passing upon an act of congress regulating corporations in the District of Columbia, the language of which is almost identical with that of our statute, it was held that the act was not penal, for reasons which we think unanswerable. We followed that decision in Low *v.* Buchanan, 94 Ill. 76, in holding that the liability created by [our statute] could only be enforced in chancery, and this is, in effect, deciding that the action is not for the recovery of a penalty. 'It is a universal rule in equity never to enforce either a penalty or a forfeiture.' 2 Story's Eq. Jur. § 1319; Queenan *v.* Palmer, 117

have the effect of charging them with this statutory liability. After the indebtedness has been created by such agents and in such manner as to constitute it a valid obligation of the corporation, it becomes the duty of the directors to recognize its validity, and, so far as in their power, provide for its payment. * * * Such assent of [directors] could only be given by some affirmative voluntary act on their part, or at least some active participation or co-operation in the particular transaction out of which that indebtedness arose."[1] In a case where it was sought to enforce

Ill. 619. In Morawetz on Corporations (Vol. 2, § 908) it is said: 'It is not always quite clear what the courts mean to express by saying that statutes of this character are penal, and that they impose upon the directors a penal liability. The liability of directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the courts mean to express. The liability of directors to creditors for a tort, or a misapplication of corporate funds, or a breach of trust, does not arise out of contract; yet the courts would certainly not call this a penal liability, or refuse to enforce it because it arose under the laws of a foreign state. Nor is the liability of the directors under these statutes penal, in the sense in which the word penal is used in common law. It is not a penalty or fine imposed by the state for the infraction of public law. The liability of the directors is, both in form and substance, a private obligation, similar in many respects to that of sureties. It is imposed by the legislature partly for the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by those who have control over the company's funds. The statutes imposing this liability establish a new rule of private right, a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency.' In Neal *v.* Briggs, 12 Ga. 104, it is directly held that a provision in the charter of a corporation prohibiting the contracting of debts in excess of three times the amount of the capital stock paid in is not penal within the statute of that state limiting the bringing of penal actions to a period of six months."

[1] Lewis *v.* Montgomery, (1893) 145 Ill. 30; s. c., 33 N. E. Rep. 880. The court, in its opinion, recites the facts as to meetings of the board, the incurring of certain debts, etc., summing up with a statement that they found no evidence except that furnished by the record of the proceedings of the board, which tended "to charge the directors, with the exception of [one who managed the business], with any direct or personal agency in the incurring or contracting of the corporate indebtedness. Except so far as they acted officially at the meetings of the board they are not shown to have personally taken any part in the corporate business. It is not shown that they personally entered into any contracts, made any purchases, transacted any business or in any way interfered with the corporate dealings. The evidence is clear that [this managing director], during all the time the corporation was doing business, was in fact its general financial manager, and had complete and unquestioned control of its business affairs. Purchases and sales were

the statutory liability of directors and officers of a manufacturing corporation for the excess of indebtedness incurred beyond the capital stock of the corporation, it was held by the Supreme Court of Illinois that advances by a factor to a manufacturing corporation of a part of the invoice price of goods, under a contract that the former is to reimburse himself from the proceeds of the goods when sold, did not create any substantial liability or

made and indebtedness incurred by him at his discretion. The directors, having full confidence in him, and recognizing the preponderating influence to which the ownership of three-fourths of the stock of the corporation seemed to entitle him, allowed him to manage the business substantially as he pleased, and failed to keep themselves informed as to the financial situation. That in all this they were grossly recreant to their legal duties as directors and officers of the corporation goes without saying. But whether they thereby incurred the statutory liability for the debts of the corporation in excess of the amount of the capital stock presents quite another question. The provisions of the statute are as follows: 'If the indebtedness of any stock corporation shall exceed the amount of its capital stock the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation.' It should be observed that the statutory liability is not predicated upon the negligence of the directors or officers in the discharge of their official duties, but upon the fact of their having 'assented' to the indebtedness which constitutes the excess over the amount of the capital stock. The contention of the complainants seems to be that as the board of directors is the governing body of the corporation, their constituting [one of their number] its general financial agent, either by appointment or by sufferance, made him their agent so as to warrant an application to them of the maxim *respondeat superior*, and to make his acts and assent the acts and assent of the directors. This position is clearly untenable. The directors, though the governing body of the corporation, are only its officers and agents, and any subordinate agent appointed by them or acting by virtue of their sufferance or recognition, does not thereby become their agent but the agent of the corporation. His acts are the acts of the corporation so as to make it liable for debts or obligations incurred by him on its behalf, but they are not the acts of the directors unless commanded or authorized by them. The fact that the directors might have interfered to prevent [this manager] from running the corporation in debt beyond the amount of its capital stock, or that they failed in other respects to perform their appropriate functions, may be charged against them as negligence, but it fails to establish their assent to the indebtedness thus contracted. In Woolverton *v.* Taylor, 132 Ill. 197, the statute sought to be invoked here was under consideration, and we there held that while the liability imposed is not penal but contractual, it is like that of a surety, and, therefore, *stricti juris.* This being the case, the statute should receive a construction in consonance with the nature of the obligation imposed. The words employed should be interpreted according to their plain and obvious meaning, and should not be extended by construction so as to embrace cases not clearly within the terms of the statute. The liability is

indebtedness against the corporation while the goods are in the hands of the factor and before their order, within the meaning of the statute of Illinois relating to such liability of directors and officers of corporations; also, that the fixing of the salary of the superintendent of the corporation and that of the secretary, in the absence of other proof, was not sufficient to show that any corporate debt was thereby incurred, as it would be presumed that such salaries were paid as they accrued. Further, it was held that to show the incurring of an indebtedness of a corporation in excess of its capital stock, it was not sufficient to show that various expenditures were ordered or authorized by the board of directors, when, so far as it appeared, such expenditures may have been met at the time by cash payments. It must be shown that such expenditures resulted in indebtedness, or formed part of the indebtedness in excess of the capital stock.[1]

§ 250. United States Supreme Court decision on a similar statute — the proper action in such a case.— An action at law was brought by a creditor of a savings bank in the District of Columbia against the trustees of the bank upon a liability as alleged incurred by a violation of the following section of the act of congress under which it was organized, to wit: "If the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." The Supreme Court of the United States affirmed the sustaining of a demurrer by the lower court to this action, holding that an action at law could not be sustained by one creditor among many for the liability thus created, or for any part of it, but that the remedy is in equity.[2]

created only where the indebtedness of the corporation exceeds the amount of the capital stock, and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors after it has been so contracted as to become binding upon the corporation, should not have the effect of charging them with this statutory liability. After the indebtedness has been created by such agents, and in such manner as to constitute it a valid obligation of the corporation, it becomes the duty of the directors to recognize its validity, and, so far as is in their power, provide for its payment."

[1] Lewis v. Montgomery, (1893) 145 Ill. 30.

[2] Hornor v. Henning, (1876) 93 U. S. 228. Mr. Justice MILLER, speaking for the court, said: "We are of opinion

§ 251. New York statute — liability for false statements in certificates, etc., filed.— It is entirely immaterial whether the creditor of the corporation relies upon the certificate filed by the officers or not. As long as the trustee knows the certificate to be false, and the debt is thereafter contracted while he is an officer of the company, it comes within the provisions of the statute making the trustees liable on account of the false statement in the certificate.[1] The plaintiff in such actions must establish that the certificate filed was in point of fact false, and that the trustees signed it with knowledge of its falsity.[2] Renewal notes given after the filing by the officers of a corporation of a false certificate that all of its capital stock had been paid in for a debt contracted by the corporation before the filing of the certificate is a "debt" within the meaning of the statute making directors and officers liable for the debts of the corporation.[3] A director cannot defend an action to make him liable for signing an annual report false in any material particular upon the ground that he was also a creditor of the corporation.[4] The constitutionality of

that the fair and reasonable construction of the act is that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that congress intended that so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it, in proportion to the amount of their debts, so far as it may be necessary to pay their debts. The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also the number and names of the creditors, the amount of their several debts, to determine the sum to be recovered of the trustees and apportioned among the creditors in a manner which the trial by jury and the rigid rules of common-law proceedings render impossible. This course avoids the injustice of many suits against defendants for the same liability, and the greater injustice of permitting one creditor to absorb all or a very unequal portion of the sum for which the trustees are liable, and it adjusts the rights of all concerned on the equitable principles which lie at the foundation of the statute."

[1] Ferguson *v.* Gill, (1892) 64 Hun, 284; s. c., 19 N. Y. Supp. 149.

[2] Ibid.

[3] Ibid.

[4] Richards *v.* Crocker, (N. Y. City Court, Spl. T. 1887) 19 Abb. N. C. 73. Judge RAPALLO in Pier *v.* Hanmore, 86 N. Y. 101, says of the purpose of this statute: "The purpose for which the annual reports are re-

the New York statute has been sustained by the Court of Appeals.[1] In actions against directors under this statute it is not necessary to show knowledge on the part of the officer at the time of signing; proof that the writing is untrue "in any material representation" would be sufficient.[2] The rule governing the action of a jury in such a case is that they are not required to give the defendants the benefit of any reasonable doubt in the

quired to be published is that the public may be correctly informed of the financial condition and resources of their companies in order that they may judge of the credit to which they are entitled." In Walton *v.* Godwin, 58 Hun, 91, Mr. Justice DANIELS used this language: "The report has evidently been required as information to the public concerning the financial condition and responsibility of the corporation. This information is intended as a security to persons dealing with the company. And whatever would materially affect their judgment in their dealings should be regarded as a material representation in the report itself. But if a report proves to be untruthful in representations which would have no effect whatever upon the judgment or conduct of persons dealing with the corporation, such representations could not be consistently held to be material. And it must be by this criterion that the question of the liability of the persons signing the report should be determined, for if it contains untruthful statements and those statements appear to be so entirely unimportant that they would not affect, in the least degree, the credit of the company or the conduct of persons dealing with it, then they cannot legally be held to be material misrepresentations." After quoting the above in Torbett *v.* Godwin, (1891) 62 Hun, 407, 411; s. c., 17 N. Y. Supp. 46; 27 Abb. N. C. 444, BARRETT, J., as to the construction to be given to the section imposing liability upon officers for certificates, etc., "false in any material representation," has said: "The construction * * * should, if possible, be in harmony with its object and purpose as thus defined. That will be accomplished by confining the liability to cases where credit may *possibly* have been given to the corporation upon the faith of the report. In other words, to debts contracted after it is filed. This gives force also to the word 'representations' as used in the section. That section does not read false in any material 'statement' or material 'fact,' but false in any material 'representation.' Representation implies an object addressed. Representations to whom, then? Plainly to any one who contemplates trusting the company thereafter. And this view is reinforced by the fact that the false representation which creates liability is not limited by the section to a certificate or report, but may be embodied in any *public notice* given by the officers of the company. Shall it be said then that for any negligent or inadvertent publication the officers of the company are to be mulcted, not only for the possible consequences of such publication, but for debts contracted before it was thought of?" The reversal of the judgment against the directors on this case negatives this query.

[1] Huntington *v.* Attrill, (1890) 118 N. Y. 365; s. c., 23 N. E. Rep. 544.

[2] Ibid.

sense applicable to criminals. They may be governed in reaching a satisfactory result by the fair preponderance of evidence.[1] The false representation alleged in this case was that the directors had represented in their report that the whole capital stock, $700,000, had been paid in. The whole stock was issued to one individual, one of the defendants here, for a tract of land upon the seashore. It became necessary, therefore, in the progress of the case for the jury to consider what was the "fair value" of this property when considered in connection with the provision of the statute which prohibits the issuing of stock of a corporation organized under it except for "property actually received for the use and legitimate purpose of said corporation at its fair value." "Fair value" in this connection the Court of Appeals of New York held to be that which the property had at the time of sale; that it was not dependent upon the subsequent success or failure of the investment, further than that result may have been legitimately within evidential contemplation at the time of the sale in view of the uses for which it may have had available advantages within itself.[2] As bearing upon the real value of this property for which the stock was issued to so large an amount it was held not to have been error to allow the plaintiff to prove on the question of value that the land purchased, with extensive improvements thereon, was afterwards sold at judicial sale for $175,000.[3] In an action of another creditor against these same defendants upon their liability under the statute for having made a false statement in their certificate which they had filed, the Court of Appeals sustained the action of the trial judge in refusing to accept a verdict of the jury for an amount less than the whole amount of his debt and directing a verdict for the latter amount on the ground that having found that the plaintiff was entitled to a recovery, that being a matter of fact for the jury, the measure of damages was the amount of the debt and this he was entitled to recover.[4] Where the liability of a trustee or director under the statute for making a false certificate has reference to an overvaluation of property taken by the corporation from its stockholders, the statute would not be violated in respect to the issuing of stock in payment for property unless such persons in bad faith

[1] Ibid.
[2] Ibid.
[3] Ibid.
[4] Hatch *v.* Attrill, (1890) 118 N. Y. 383; s. c., 23 N. E. Rep. 549.

put a fictitious value upon their property for the purpose of evading the statute and defrauding others. If done, and the trustee knew of it, he would be liable.[1] The rule that to sustain an action for fraud founded upon representations made by one charged with fraud, it must be made to appear that he believed, or had reason to believe, at the time he made them, that the representations were false, or that, without knowledge, he assumed or intended to convey the impression that he had actual knowledge of their truth, and that the injured party relied upon them to his injury, is applicable to the case of representations made by a director of a corporation, in the form of published statements and reports, as to its financial condition. Knowledge of all the affairs of the corporation cannot be imputed to him for the purpose of charging him with fraud.[2] In a case brought by one who alleged that he had been led to loan a large sum of money to a corporation by the false and fraudulent representations of its trustees as to its capital stock having been paid in, etc., in a report, there was a judgment against all the trustees. On the appeal it was held by the court that the facts that the name of one of these defendants was published as a trustee of the corporation and that a certificate of stock was issued to him were not sufficient to authorize a verdict against him for the fraud perpetrated by other trustees and agents of the corporation.[3] The mere fact of being a director and stockholder is not sufficient *per se* to hold one so situated liable for the frauds and misrepresentations of the active managers of a corporation. They are the agents of the corporation, not of the directors, as individuals, and have no power to bind the latter by their statements. Some knowledge and participation in the act claimed to be fraudulent must be brought home to the person charged. It is only where a director lends his name and influence to promote a fraud upon the community, or is guilty of some violation of law or other mismanagement that he is personally liable.[4]

§ 252. **Illustrations.**— A statement in such a report that certain persons are stockholders in the corporation, and that the

[1] Van Vleet *v.* Jones, (1894) 75 Hun, 340; s. c., 26 N. Y. Supp. 1086.

[2] Wakeman *v.* Dalley, (1872) 51 N. Y. 27; s. c., 10 Am. Rep. 551, affirming 44 Barb. 498.

[3] Arthur *v.* Griswold, (1874) 55 N. Y. 400.

[4] Ibid.

amount of their stock has been already paid, when in fact such persons are not stockholders at all, would be "false in a material representation."[1] That defendant signed such report in good faith under the advice of counsel, and that he believed the statement made in it to be true would be no defense against his statutory liability under this statute.[2] It appeared in a New York case that one who was named in the annual report made by the corporation under the requirements of the statute as one of the stockholders was not and never had been the owner of stock in the corporation; that a certificate for ten shares of stock, amounting to the sum of $1,000. had been sent to him, which he had refused to accept and had returned, and that this amount, as well as an additional sum of $1,000, for which there was no foundation whatever, was included in the amount of the capital stock of the corporation stated in the report to have been paid in. The other stock paid in was stated at $148,600. The Supreme Court in General Term held that, in view of the fact that the jury might have found that $146,600 of the capital stock of the corporation had been paid in, this error to the extent only of $2,000 did not make the report "false in any material representation."[3] In a case before the New York Court of Appeals, brought by a creditor against a trustee of a corporation to enforce the liability of the latter under the New York statutes for making a statement in the annual report that the capital stock of $2,000,000 had been paid up in full, on the ground that the statement was false to the knowledge of the signers, it appeared that the stock of the corporation was issued to one, in payment for certain iron mining property, then undeveloped, which property he had purchased of a corporation of which the trustee sued was a stockholder, and the latter received from him $10,000 of the stock of the new corporation to enable him to act as trustee. The vendor of the property sold to the corporation surrendered to the new corporation 1,000 shares of the stock, which was pledged, with

[1] Brandt *v.* Godwin, (City Court N. Y., Spl. Term, 1889) 3 N. Y. Supp. 807.

[2] Ibid.

[3] Walton *v.* Godwin, (1890) 58 Hun, 87; s. c., 12 N. Y. Supp. 436. DANIELS, J., said: "This slight discrepancy or difference in so large an amount would have no effect whatever upon the transactions or dealings of creditors with the corporation And for that reason these statements could not be assumed to be, as they appear to have been in the charge of the court, materially false statements rendering the officers who signed the report liable for its debts."

$70,000 of the bonds of the corporation, to secure a loan of $35,000, and gave 500 shares of the stock as a commission to the officer who negotiated the loan. The property which was sold by this vendor to the new corporation for $1,000,000 of the stock of the new corporation and $200,000 of its bonds, and the consideration for which was expressed in his deed to the new corpotion as $600,000, proved to be worth not over $60,000. The trustee sued had knowledge, it was shown, of all these facts. The Court of Appeals held that the facts justified a finding that this trustee signed the report in bad faith, knowing it to be false.[1] In an action against trustees of a manufacturing corporation to enforce the liability imposed by the statutes of New York[2] for making a false report, where the falsity alleged was solely in the statement that the capital stock had been paid in full, without stating that all or a portion of it was paid for in property as required by a later statute,[3] the New York Court of Appeals declared this rule to be applicable, to wit: To charge the officer with the severe penalty imposed for signing a false report, knowing it to be false, some fact or circumstance must be shown indicating that it was made in bad faith, willfully, or for some fraudulent purpose, and not ignorantly or inadvertently, and this is a question of fact which must be passed upon before the liability can be adjudged.[4] Finch, J., further said: "But the necessity of such proof of a willful and fraudulent purpose we confined to a case where the sole falsity of the report originated in our construction of its import, as meaning a payment in cash, although not so stated in express terms, and where, as a consequence, it was possible for the officer to have signed what we construe to be a falsehood, but what, as he understood it, might have been a truth. In such case it is just to require that some evidence of bad faith, something indicating a consciousness of falsehood instead of belief of truth should be given. In other words, the penalty follows an actual and not a constructive falsehood; one known and understood to be such and possibly believed to be otherwise."[5] The trustees of a manufacturing corporation

[1] Blake *v.* Griswold, (1886) 103 N. Y. 429. The court distinguished Lake Superior Iron Co. *v.* Drexel, (1892) 90 N. Y. 87.

[2] N. Y. Laws 1848, chap. 40, § 15.

[3] N. Y. Laws 1853, chap. 333.

[4] Bonnell *v.* Griswold, (1882) 89 N. Y. 122; rule declared in Pier *v.* Hanmore, 80 N. Y. 128.

[5] Ibid., in which it was held that where the stock of the corporation was actually paid in in cash, the mere

would not incur the liability imposed upon them by the statutes of New York[1] for signing an annual report "false in any material representation," simply by omitting from the aggregate indebtedness of the corporation certain liabilities of the corporation, although they may have known of it at the time the report was made.[2] The liability of a director of a corporation formed under the New York statute[3] by reason of making a false report abates on the death of the original creditor of the corporation, and cannot be revived in favor of or prosecuted by his personal representatives.[4] The Maryland Court of Appeals, two justices, however, dissenting, has held that the liability imposed upon directors or officers by the New York statute on account of false statements in reports, etc., required of them as to any material representation was a penalty and not enforceable in the state of Maryland; and that if a judgment had been obtained in New York under the statute, no action could be maintained on the judgment in the state of Maryland.[5] The officers of a corporation organized in pursuance of a plan of a syndicate for whom property had been purchased for $150,000, with a view to sell the same to this corporation, certified that stock of the value of $1,500,000 had been issued to the amount of the value of the property purchased of the syndicate for the purpose of the corporation. These officers were held liable to persons who had advanced money to the corporation under the statute of New York, which provides that "if any certificate or report made, or public notice given, by the officers of any such company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof." The statement in the

fact that the corporation bought out assets of an old company at their fair value did not call for or authorize a statement in the report that the stock had been paid for in property. See, also, Wickens *v.* Foster, (1885) 22 N. Y. Wkly. Dig. 426.

[1] N. Y. Laws 1848, chap. 40, § 15.

[2] Butler *v.* Smalley, (1885) 101 N. Y. 71.

[3] Laws N. Y. 1875, chap. 611.

[4] Boyle *v.* Thurber, (1888) 50 Hun, 259; following Brackett *v.* Griswold, 103 N. Y. 425.

[5] Attrill *v.* Huntington, (1889) 70 Md. 191; s. c., 16 Atl. Rep. 651; citing, in support of the holding, Flash *v.* Conn, 109 U. S. 376; Wisconsin *v.* Pelican Insurance Co., 127 U. S. 290.

certificate as to the stock was held to be a false one within the letter and the spirit of the statute.[1]

§ 253. Statutory liability — Rhode Island statutes.— The statutes of Rhode Island providing that if certain certificates are not filed, certain officers of corporations shall be liable for "all debts of the company contracted," has been construed by the Supreme Court of that state, and they have held that the words "debts contracted" did not include torts of the corporation, nor judgments against the corporation founded on such torts.[2] So, all the other statutes which provide that, if the debts of a corporation exceed its paid-in capital, the directors under whom the excess occurs shall be liable jointly and severally to the extent of the excess, "for all the debts of the company then existing, and for all that shall be contracted as long as they shall respectively continue in office," and until the excess shall disappear, have also been construed, and the directors held not to be liable for torts of the corporation committed pending the excess, nor for judgments against the corporation founded on such torts.[3]

§ 254. Statutory liability — various states.— The statutes of Indiana provided, as to such corporations as the one involved

[1] Chittenden *v.* Thannhauser, (1891) 47 Fed. Rep. 410.

[2] Pub. St. R. I. 1882, chap. 155, §§ 2, 3, 4.

[3] Pub. St. R. I. 1882, chap. 155, § 15; Leighton *v.* Campbell, (1890) 17 R. I. 51; s. c., 20 Atl. Rep. 14. The court said: "The plaintiff cites in support of this contention Mill Dam Foundery *v.* Hovey, 21 Pick. 417, 455, and Carver *v.* Braintree Manufacturing Company, 2 Story, 432. These cases relate to the liabilities of corporations under a Massachusetts statute subjecting them to individual liability for the 'debts and contracts' of the corporation, or for the 'debts contracted' by it, and not to the liability of officers of corporations under other provisions. In the first case it was held that the phrase covered a claim for unliquidated damages arising *ex contractu*. In the second it was held that the phrase 'debts contracted,' being broadly construed, covered a liability incurred by the infringement of a patent, or, in other words, a liability for tort. Judge Story, in giving this construction, relied somewhat on the authority of Mill Dam Foundery *v.* Hovey, but still more on his view that the provision imposing the liability was to be regarded as remedial, and was, therefore, to be liberally construed, in fact virtually conceding that, in any other view, the construction would be too broad. In Child *v.* Boston & Fairhaven Iron Works, 137 Mass. 516, the court say, in criticism of Carver *v.* Braintree Manufacturing Company: 'There are no cases decided by the courts of the commonwealth in which a stockholder has been held liable for a tort of the corporation, and other decisions of Mr.

in a case before the Supreme Court of that state, as follows: "The capital stock, as fixed by such company, shall be paid into the treasury thereof within eighteen months from the incorporation of the same." "If any company organized and established under the authority of this act, and of the act to which this is supplementary, shall violate any of the provisions thereof, and shall thereby become insolvent, the directors ordering or assenting to such violation shall jointly and severally be liable in an action founded on said acts, for all debts contracted after such violation as aforesaid." It was ruled in the case that if the directors, or any number of them, refused to enforce, on behalf of the company, the duty of the company to collect the stock, such refusal was an assent on their part to a violation of the company's duty, and it was immaterial whether the plaintiff sued all or a majority of the directors.[1] A protest, not in writing, by a director of a gravel road company, before the board against the contracting of debts in excess of its solvent stock, will absolve

Justice STORY stand unsupported by any direct authority, either before or since.' There are cases of other states in which it has been held that the words 'debts contracted' do not subject the corporators to liability for the torts of the corporation. Heacock *v.* Sherman, 14 Wend. 58; Bohn *v.* Brown, 33 Mich. 257; Cable *v.* McCune, 26 Mo. 371. In the case at bar, however, the question relates not to the corporators, but to officers, under provisions relating to them exclusively as such, imposing duties on them, and making them liable in case they reject or refuse to perform them. These provisions, as contradistinguished from the provisions in regard to corporations, are deemed to be penal, and for that reason to be strictly construed. Chase *v.* Curtis, 113 U. S. 452. We do not think that any court would hold that the words 'debts contracted,' if strictly construed, would cover unliquidated claims for damages arising *ex delicto*. Child *v.* Boston & Fairhaven Iron Works, [137 Mass. 516]." As to the contention that the claim had been reduced to judgment, and thus become a debt of the corporation, it was said: "The New York cases, under statutory provisions similar to ours, hold that, in that state, the trustees of corporations are liable, if at all, only on the original claim, and that a judgment against the corporation thereon has no effect as against them. Miller *v.* White, 50 N. Y. 137; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Esmond *v.* Bullard, 16 Hun, 65. It has been held in other states that the reduction of a claim for damages against a corporation arising *ex delicto* to a judgment does not change its character as against the delinquent officers, so as to charge them thereon as for a debt contracted by the corporation. Cable *v.* Gaty, 34 Mo. 573; Bohn *v.* Brown, 33 Mich. 257; so, also, by the Supreme Court of the United States, Chase *v.* Curtis, 113 U. S. 452;" citing, also, Whitaker *v.* Masterton, 106 N. Y. 277, 280, upon some points.

[1] Clow *v.* Brown, (1892) 134 Ind. 287; s. c., 33 N. E. Rep. 1126.

him from liability on account of such contracting of debt.[1] In an action to enforce such a liability of directors, it must be averred and proved that the directors against whom the action is brought contracted the debt, and that the debt, when contracted, exceeded the solvent stock of the company.[2] The failure of a majority of the directors of a corporation to file the reports, as required by the law of Michigan, will be presumed intentional, and will render each director liable for the debts of the corporation under the statute which renders the directors of corporations liable if they "intentionally neglect or refuse to comply" with its provisions.[3] The Montana Supreme Court has held that the statute of that state imposing an individual liability upon the trustees of a corporation for not filing the annual report of the corporation's condition required by the statute could not be construed so as to excuse the trustees from liability for debts contracted prior to a default in the matter of filing the report. Therefore, they held that the facts stated in defense to an action to enforce such statutory liability that before the time for filing such annual report the corporation was insolvent and had entirely abandoned its business; that all the property of the corporation belonged to one of its trustees, having been delivered to him in satisfaction of an indebtedness, and that for a period of two months no officer or trustee had exercised any corporate act or function, and that there was no intention to resume the business of the corporation, did not dissolve the corporation and constituted no defense to the action.[4] Officers of a corporation certifying that the capital

[1] Schofield *v.* Henderson, (1879) 67 Ind. 258.

[2] Aimen *v.* Hardin, (1877) 60 Ind. 119.

[3] Van Etten *v.* Eaton, 19 Mich. 187. As to the construction of the statute referred to, see Breitung *v.* Lindauer, 37 Mich. 217. As to what are "debts" within the meaning of this statute, the Supreme Court of Michigan has said, in Lockhart *v.* Van Alstyne, 31 Mich. 76, 78: "Liabilities of a company which may give cause of action against it and result in judgments are not within the statute unless they constitute present debts. A debt is that which one person is bound to pay another, either presently or at some future period; something which might be the subject of a suit as a debt, and not something to which the party may be entitled as damages in consequence of a failure to perform a duty or keep an engagement. A right to a dividend from the profits of a corporation is no debt until the dividend is declared. Until that time, the dividend is as something that may possibly come into existence, but the obligation on the part of the corporation to declare it cannot be treated as the dividend itself."

[4] Gans *v.* Switzer, (1890) 9 Mont. 408; s. c., 24 Pac. Rep. 18.

stock of the company is paid in, when in fact it is paid in property of an uncertain value, will be liable under the New Jersey statute making them liable for the debts of the corporation in case they falsely certify that the capital stock has been paid in.[1] The statute of Vermont making the directors of a private corporation liable for all "debts contracted" before the publication of its articles of association, has been held not to embrace all contracts entered into by the corporation before such publication, but only "debts" so contracted; it would not embrace damages for the non-performance of a special contract.[2] The assenting by a director of a corporation to the execution of new notes for former notes held by the corporation, where the original indebtedness was not increased thereby, it being only the substitution of one set of notes for the other, it has been held did not fall within the statute of Vermont which prohibited the contracting of debts to an amount greater than three-fourths of the capital stock paid in, and making any director assenting thereto liable for the excess to the creditors of the corporation.[3] A statute of Vermont (R. L. Vt. § 3279) provides that in case debts are contracted by a corporation for voluntary association before compliance with the provisions of the preceding section (3278), the president and directors shall be personally liable for such debts. The Supreme Court of that state said: "It is clear that the conditions precedent to the creation of a liability under that section are, first, the existence of a corporation, recognized as such by the laws of this state; second, the contracting of a debt by such corporation, and, third, a failure to comply with the provisions of section 3278 before the contraction of such debt." They held that where articles of association, under chapter 153, Revised Laws of Vermont, are signed upon the understanding that they shall not take effect until the happening of a certain contingency, they do not become effective, and no corporation exists until that contingency happens; in such case a director, who is guilty of no act or omission by which the party extending the credit is misled, would not be liable; but where the defendant represented to the plaintiff that such corporation had been legally organized, and that he was a director, he was held to be estopped from making this defense

[1] Waters v. Quimby, 3 Dutch. (N. J.) 198; affirmed in 4 Dutch. 533.

[2] Cady v. Sanford, 53 Vt. 632.

[3] National Bank v. Paige, 53 Vt. 452.

and to be liable under the statute.[1] "Debts contracted" for which negligent officers of corporations, under Connecticut statutes, may be held liable, must be debts of the corporation in favor of some one who gave it credit.[2] The Code of Virginia makes those of the directors of a corporation, who declare a dividend of net profits, when the corporation is insolvent, who concur in the act in their individual capacity, jointly and severally liable to the creditors of the corporation for the amount of the capital stock so divided. In an action to enforce the personal liability under this statute, the question of the insolvency of the corporation when the dividend may have been declared is a question of fact, and the insolvency of the corporation must be established by proof to justify a recovery from the directors individually.[3] The United States Supreme Court has held that the remedy in the courts of the United States to enforce the personal liability of directors for permitting the corporation to contract debts in excess of the capital stock, under the statutes of a state, is by bill in equity.[4]

§ 255. Liability of directors or officers under an English statute.— An English statute provided that if it appears, in the

[1] Corey *v.* Morrill, (1889) 61 Vt. 598; s. c., 17 Atl. Rep. 840.

[2] Armstrong *v.* Cowles, 44 Conn. 48; Gen. St. Conn. 314, § 3.

[3] Slaymaker's Admr. *v.* Jaffray & Co., (1886) 82 Va. 346.

[4] Stone *v.* Chisolm, (1885) 113 U. S. 302; s. c., 5 Sup. Ct. Rep. 497, a case brought under the statute of South Carolina. It was said by the court: "The conditions of the personal liability of the directors of the corporation, expressed in the statute, are that there shall be debts of the corporation in excess of the capital stock actually paid in, to which the directors sought to be charged shall have assented, and this liability is for the entire excess both to the creditors and to the corporation. To ascertain the existence of the liability in a given case requires an account to be taken of the amount of the corporate indebtedness, and of the amount of the capital stock actually paid in; facts which the directors, upon whom the liability is imposed, have a right to have determined, once for all, in a proceeding which shall conclude all who have an adverse interest, and a right to participate in the benefit to result from enforcing the liability. Otherwise, the facts which constitute the basis of liability might be determined differently by juries in several actions, by which some creditors might obtain satisfaction and others be defeated. The evident intention of the provision is that the liability shall be for the common benefit of all entitled to enforce it according to their interest or apportionment, which, in case there cannot be a satisfaction for all, can only be made in a single proceeding to which all interested can be made parties." Adhering to and reaffirming Hornor *v.* Henning, 93 U. S. 228.

course of winding up any company, "that any past director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may * * * examine into the conduct of such director, manager or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance or breach of trust as the court thinks just." This statute has been construed by the Court of Appeal with this result: The remedy afforded by this statute is only for the recovery of damages for losses incurred. The misfeasance to which it is directed is not restricted to acts of commission, but extends to all breaches of trust in relation to a company, through which loss is incurred. Misfeasance is not to be imputed to a director unless he has dishonestly acted or abstained from acting in conflict with his plain duty, and the burden of proof lies on the party making the charge, but in considering the question of the director's liability, there must be imputed to him a special knowledge of the business which he has undertaken. The Court of Appeal held that directors were liable for losses occasioned through acts done by them as directors in matters which are *ultra vires* the company, and that their liability was not dependent upon any question of honesty of intention.[1] In a very recent case involving the liability of directors of a company under this statute or a later one replacing it, the directors were held liable to repay an amount of money which they had invested, of the company's, in shares of a building securities company, which investment was *ultra vires* on the part of the company they represented. It appeared, also, in this case that two of the directors were not present at the meeting when the investment was ordered, but they were present at the next meeting at which the minutes of the previous meeting were read and confirmed. One of them was in the chair and signed the minutes. He was, also, in the chair at the next general meeting of the company, and then

[1] In re The Liverpool Household Stores Association (Limited), (1890) 59 L. J. R. (N. S.) Ch. Div. 616.

referred to this investment, and, speaking in behalf of the directors, said: "We carefully considered the matter and deemed it advisable to exercise our right of subscription, and have no reason to regret our decision." The Court of Appeal held that although the presence of these two directors at the meeting at which the minutes of the previous meeting were confirmed was not sufficient, in itself, to make either of them liable for the *ultra vires* investment, yet the one presiding had, by his action as chairman at that meeting, and by his statement at the general meeting of the company, shown that he took an active part in the investment and would be held responsible for it.[1] It was held that as to one *ultra vires* investment these directors, being considered in these matters of liability, by the courts, in the light of trustees, were entitled to the benefit of the English Statute of Limitations with reference to trustees.[2] A director in this English case held shares of a company not fully paid up, and his directors' fees were unpaid. On a day when the company's balance at its bankers was two pounds, eleven pence, he gave to the company a cheque for seventy pounds, the amount remaining unpaid on his shares, and received at the same time from the company a cheque for a like amount, on account of his fees, signed by himself and another director. Within three months there were proceedings for winding up the company. The Court of Appeal held that the payment to the director was a preference which, by the terms of the statute, should be deemed to be fraudulent, and that all the directors who concurred in making the payments were guilty of a misfeasance, and that they should be ordered, jointly and severally, to repay the amounts.[3] In another case of a winding up of an English company, it appeared that two persons who were working a quarry in partnership, one of them owning an adjoining quarry and having an option of a lease of a third, wishing to form a company for working them, called in two other persons for the purpose, and the four entered into an agreement with a trustee for the intended company to sell to the company the quarries, to be paid partly in cash and partly in paid-up shares, the two who were called in to receive 120 shares each. The company was formed. One of the latter two persons

[1] In re Lands Allotment Co., Law Rep. (1894), 1 Ch. 616.

[2] Ibid.

[3] In re Washington Diamond Mining Co., Law Rep. (1893), 3 Ch. 95.

was one of the first directors. The agreement between the four and the trustee of the company was confirmed and these two received their paid-up shares. It developed, upon the winding up of the company, that these parties called in had no interest in the property sold to the company, except their interest as lessees of the third quarry, which lease was of even date with the agreement to sell to this company, and the director of the company admitted that he had no interest in this latter, until that day, and had nothing to do with fixing the price. The articles of the company provided that the agreement for sale should not be impeached on the ground of the directors, or any of them, being vendors or promoters of the company, nor should they be accountable for benefits secured to them. The trial justice held that this director was liable to contribute to the assets of the company a sum equal to the nominal amount of the shares issued to him and to the other party, on the ground of his misfeasance as a director in accepting the shares allotted to himself, and in allowing the shares of the other party to be issued to him. The Court of Appeal held, affirming the decision of the trial justice, that, although if these parties had been *bona fide* owners of shares in the leased quarry, and had agreed to sell their interests for shares in the company, the transaction could not have been impeached, the insertion of their names as vendors, when they had no real interest in the property sold, was a device for enabling them to get fully paid-up shares for their services in the promotion of the company, and that the issuing of those shares was a misfeasance on the part of the directors, and that, as it was not known to the company that these parties were not really vendors, the clause in the articles was no protection to the director.[1] In another English case it appeared that the directors of a company having power to lend money and to promote other companies, passed a resolution that a cheque for £250 should be drawn in favor of a third party, for a loan to him of that amount, on certain security. The cheque was drawn and handed to the solicitor of the company, who gave it to the payee without receiving the security. The directors passed a second resolution that a cheque for £1,000 should be drawn in favor of the same party for a loan to him of that amount on security of (*inter alia*), a contract, the date of which and the names of the parties to which, were left in blank

[1] In re Westmoreland Green & Blue Slate Co., Law Rep. (1893), 2 Ch. 612.

in the resolution. This cheque was, also, drawn and handed to the solicitor of the company, who gave it to the payee without obtaining the security. The directors knew the nature of the contract, and that it related to a company which the payee of the cheque was bringing out, and the existence of which the directors believed to be for the benefit of their own company, and they advanced the £1,000 to assist him in bringing out the new company. The company afterwards sued this party for the amount of the loans, recovered judgment against him, but never realized anything on the judgment. In the winding up proceedings of the company, it becoming insolvent, the liquidator, under the English statutes, sought to charge the directors with the sums loaned. VAUGHAN WILLIAMS, Justice, held that the directors, having exercised judgment and discretion, were not liable for misfeasance or breach of trust in relation to the company.[1] One who was requested by the promoter of a projected company to become a director, agreed to do so upon the terms that, if he should at any time desire to part with the shares which he was to take in order to qualify him as director, the promoter should purchase them from him at the price he should pay for them. The company was subsequently formed and he became a director, took the qualification shares, and paid for them at par out of his own money, and from time to time acted as director, but he never disclosed to his co-directors or to the company, the existence of his agreement with the promoter. He afterwards resigned his office as director, and subsequently to his resignation, the promoter, at his request, paid to him the sum which he paid for the shares, and accepted a transfer of them. At this time the shares were valueless in the market. The English Court of

[1] In re New Mashonaland Exploration Co., Law Rep. (1892), 3 Ch. 577. Referring to the statute, section 10 (Winding Up) Act, 1890, the justice said: "It has been said that you cannot bring directors within the section, unless they have been guilty of a misfeasance in the nature of a breach of trust; but, be that as it may, it is plain that if directors are guilty of such negligence that it cannot be said that in doing what they did they attempted to perform their duty as directors, then such directors are guilty of misfeasance To use [counsel's] words, if the directors did not *bona fide* exercise their discretion and judgment as agents of the company, that is misfeasance within the meaning of the section. I shall adopt that construction with the exception of the words *bona fide*, and hold that, in order to make the directors liable, you must be able to deny that they did really exercise their judgment and discretion in this way."

Appeal, in a proceeding under the Winding Up Act, to charge him as director, held that, having regard to his position as director of, and, therefore, agent for, the company, whatever benefits or profits accrued to him under the indemnity constituted by his secret agreement with the promoter belonged to the company, and that the retention by him of the proceeds of the indemnity occasioned a loss to the company for which he was accountable, with interest.[1]

[1] In re North Australian Territory Co., Archer's Case, Law Rep. (1892), 1 Ch. 322. LINDLEY, Lord Justice, in his opinion quotes from MELLISH, Lord Justice, in Hay's Case, Law Rep., 10 Ch. 593, 601, these words: "There is no doubt about the rule of this court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency, beyond his proper remuneration as agent. It is perfectly-settled law that that rule applies, with peculiar stringency, to the directors of joint-stock companies, who are the agents of the company for effecting the sales or the purchases made by the company." FRY, L.-J., in his opinion, said: "In Hay's Case [Law Rep., 10 Ch. 593], the company agreed to pay a sum of money to the vendors of the property. On one day they were paying a sum of £58,000, in part payment of that purchase money; cheques were drawn in favor of the agent of the vendors, and one of these cheques was indorsed over to Sir John Hay, and cashed by him. The company, therefore, were making a payment which they were bound to make, and they lost nothing, in one sense, by Sir John Hay receiving that money. The only loss they sustained was by Sir John Hay not accounting for it when he got it. It appears to me there was, therefore, exactly the same loss in that case as there is in the present case. Again, in Pearson's Case [5 Ch. Div. 336], the same observation can be made. The company there issued to its promoters, under an agreement, fully paid-up shares. Some of these shares were given by one of the promoters to Sir Edwin Pearson, one of the directors, on his qualification. The company, therefore, got all they stipulated for, all the shares that they issued and which were in Sir Edwin Pearson's hands, having been, by agreement, issued as fully paid up, and yet, because he ought not to have taken those fully paid-up shares, but ought to have paid the amount which was not payable by reason of the bargain between the company and the promoters, he was held liable to make good, and treat the shares as if they had not been paid up at all. It might be said in both these cases (in Hay's case the payment was by the vendors, and in Pearson's case the payment was by a promoter), that the company lost nothing by the money in the one case, and the shares in the other, reaching the hands of the director, but the court said in each case that, because the director was accountable, the company were losers to that extent. * * * On principle, I think the two cases to which I have referred are not distinguishable from the present." As to the liability, under this English statute, of a trustee or manager of a savings bank, to pay an adequate sum towards the assets of the bank by way of compensation for any loss occasioned to the bank by his neglect or omission, see In re Cardiff Savings Bank, Davies' Case, (1890) 45 Ch. Div. 537.

CHAPTER VII.

ULTRA VIRES — PUBLIC CORPORATIONS.

§ 256. Issue of negotiable securities.—The officers or official agents of counties, as well as other municipal corporations, without express legislation, have no power to issue commercial paper and thereby impose upon the corporation the duties and liabilities incident to such paper.[1] In a case before the federal court a city had entered into a contract with a firm by which the latter agreed to vest title in the city to certain strips of land, to do certain other things with reference to widening a street, and to secure certain sewer privileges and the relocation of certain tracks of railroads, and the city agreed to pay them for such real estate and their services. In payment of the same the city issued to this firm certain "certificates of indebtedness" and delivered them to the bank to which the firm had contracted to sell them. It was held in the United States Circuit Court that, in the absence of any special statutory authority, a city had no right to issue such certificates in negotiable form, even in payment for property which it had authority to buy.[2]

[1] People ex rel. *v.* Johnson, 100 Ill. 537; People ex rel. *v.* Kingsbury, 100 Ill. 509; People ex rel. *v.* La Salle County, 100 Ill. 495.

[2] Bangor Savings Bank *v.* City of Stillwater, (1891), 46 Fed. Rep. 899. The provisions of the charter of the city were discussed by the courts, and the powers thereunder given were declared in the opinion. Thayer, J., said: "[The city] had [the] right [to contract with this firm for the acquisition of land and privileges], we think, under power conferred upon the

§ 257. **Borrowing money by school districts.**—As a general rule a corporation, either public or private, has an implied power to borrow money for objects expressly authorized by the statute by which it was created and endowed with corporate powers and privileges, but if such power is expressly or by

city council * * * 'to open, establish, vacate and widen streets, to construct, maintain and extend sewers, and to condemn and purchase the lands necessary to be used for street and sewer purposes.' * * * These powers were sufficient to authorize the city council to contract with [the firm] to purchase the lands in question, and to render the services which they undertook to render for and in behalf of the city. But it is a different question whether the city had authority to pay for such services in the manner proposed; that is to say, by the issue of certificates of indebtedness, payable to order and running one, two and three years. Plaintiff's attorneys strenuously insist, and in that we agree with them, that the so-called 'certificates of indebtedness' are in reality negotiable bonds or notes, which, under the law-merchant, may be transferred by indorsement from hand to hand, so as to cut off equities of defense. In a recent case, which contains an elaborate review of previous decisions on the same subject, the doctrine was restated that municipal corporations have no power to utter commercial paper, unless it is expressly conferred upon them by law or is clearly implied from some other power expressly given. It was further held that no implication arises that a municipality may make commercial paper and put the same on the market from the fact that it is expressly authorized to borrow money. 'To borrow money,' say the court, 'and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities which may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. Merrill *v.* Town of Monticello, 138 U. S. 673; s. c., 11 Sup. Ct. Rep. 441, 448. See, also, Claiborne Co. *v.* Brooks, 111 U. S. 400, 486; s. c., 4 Sup. Ct. Rep. 489; Police Jury *v.* Britton, 15 Wall. 566; Young *v.* Clarendon Township, 132 U. S. 340; s. c., 10 Sup. Ct. Rep. 107. In the present instance it appears that the so-called 'certificate' or 'bond' remains in the hands of the original payee, the Bangor Savings Bank; it has not been negotiated, and it contains on its face a recital that it was issued in consideration of the performance by [this firm] of a certain contract * * * dated December 21, 1887,' which is notice to the holder of the provisions of that contract. No question of estoppel or touching the superior rights of a transferee for value can arise in this case. The point to be determined is simply whether the city of Stillwater had any authority, under its charter, to issue negotiable bonds to [this firm] for the land to be procured and the services to be rendered, and this question we think must be answered in the negative. By [a certain] section * * * of its charter 'the committee on finances of the city council, * * * upon order of the council, may, from time to time, borrow for and in behalf of said city such sums of money as may be necessary for temporary purposes, and to anticipate the current revenue only.' It is obvious, we think, that the issue of bonds to [this firm], under the circumstances and for

implication denied by such statute, then no such power exists. The trustee of a school township, for instance, in Indiana, under the provisions of the school law which, by implication, deny the existence of such a power, cannot negotiate a loan for money and execute a note for its payment.[1] But where

the purpose explained, cannot be supported under this clause. Short, temporary loans, in anticipation of, and to be paid out of the current revenue for the year, is all that this section contemplates. Again, by [other] sections * * * the city was authorized to issue and sell bonds and put the avails thereof in the city treasury to create what is termed a 'permanent improvement fund.' Whether the city had already issued all the bonds authorized to create the permanent improvement fund does not appear, but that is immaterial, as, in our view, it could not issue the so-called 'certificates' under the sections of the charter last referred to, its duty having been in our judgment to pay [the firm] in money out of the 'permanent improvement fund,' as the charter seems to contemplate, instead of issuing to them negotiable bonds. The only other authority to be found in the city charter to issue negotiable paper is contained in [a section authorizing] an issue of bonds to meet other maturing bonds of the city when there was a deficiency in the 'sinking fund;' but it also contains the following important prohibition in the concluding paragraph of the section, to wit: 'But neither said city council nor any officer or officers of said city shall otherwise, without special authority of law, have authority to issue any bonds or create any debt or liability against said city in excess of the amount of revenue actually levied and applicable to the payment of such liability.'"

[1] Wallis v. Johnson School Township, (1881) 75 Ind. 368. The court said: "Section 7 [of the school law] provides, *inter alia*, that the trustee shall receive and pay out the special school revenue and also the revenue for tuition appropriated to his township, and shall pay out the same for the purposes for which such revenues were collected and apportioned. Section 10 in express words places the trustee in charge of all the educational affairs of the township and empowers him to employ teachers and to build and furnish school houses. These provisions do undoubtedly confer broad and comprehensive powers upon township trustees, and were there no restrictive provisions we should be compelled to hold that, with this broad grant of express powers, there was coupled the incidental one of borrowing money. We think, however, that there are restrictive provisions which, fairly construed, must be held to deny the authority to negotiate bonds. In section 6 it is provided that the county auditor, in fixing the penalty of the bond of trustees, 'shall see to their sufficiency to secure the school revenues which may come into their hands.' There is here a clear implication that the only money which a trustee can officially receive is that yielded by the school revenues. Money obtained by borrowing cannot be said to be school revenue. If an action were brought upon the trustee's bond, and the only breach shown should be the misappropriation of money obtained by borrowing it, it is clear that the action would fail, for the reason that the penalty of the bond extends only to money received from the school reve-

money is thus borrowed for a school township district by its trustee, and actually and rightfully expended for the benefit of the school corporation it will be liable for the amount.[1] In a later case the Indiana Supreme Court adhered to the ruling that the trustee of a school corporation has no authority to borrow money and execute promissory notes therefor in the name of the corporation.[2]

§ 258. Incurring liability in excess of funds in the treasury and amount of tax allowed for one year.— The Minnesota

nues. The sources from which school revenues are derived are created and defined by law, and it is from these sources only that the trustee has a right to secure money for school purposes."

[1] Wallis *v.* Johnson School Township, (1881) 75 Ind. 368. See, also, Bicknell *v.* Widner School Township, 73 Ind. 501. Where the money borrowed was actually used in paying for a school house, the township was held liable as "for money had and received, which was applied to the lawful use of the township."

[2] Union School Township *v.* First National Bank of Crawfordsville, (1885) 102 Ind. 464; citing in addition to the two cases last cited, First National Bank *v.* Union School Township, 75 Ind. 361; Pine Civil Township *v.* Huber Manufacturing Co., 83 Ind. 121; Reeve School Township *v.* Dodson, 98 Ind. 497. Upon this point it is said by the court in Union School Township *v.* First National Bank of Crawfordsville, (1885) 102 Ind. 464, 475: "It is true that we have held that where the money received on notes executed in the name of the school corporation goes to pay for property received by it, the person advancing the money will be subrogated to the claim of the person who actually furnished the property, but we have steadily held that it is only in cases where the school corporation actually received the property purchased, that subrogation can take place. It is well known that subrogation arises, not by contract, but by force of equitable principles, and only in cases where good conscience requires that it should take place in order to prevent injustice." Upon the subject of estoppel, it was said: "It is a fundamental principle that a governmental corporation is not estopped by the act of an officer in cases where the act is beyond the scope of his authority. Public corporations stand on an essentially different ground from private ones, and other rules which apply to the one class do not apply to the other in cases where the doctrine of *ultra vires* is invoked. Driftwood Valley Turnpike Co. *v.* Board, etc., 72 Ind. 226; Cummins *v.* City of Seymour, 79 Ind. 491, 497; s. c., 41 Am. Rep. 618. But the power of a school corporation is much more limited than ordinary public corporations, for there is no general power to incur debts or execute evidences of indebtedness, and, certainly, no such power exists where the school trustee is provided with money from the school revenues. The school corporation is, in truth, one of unusually limited powers, for the only source from which it can derive money is the school fund or school revenues, and, strictly speaking, its only power is to receive and disburse the funds allotted to it."

statutes as to counties and their financial management have been construed by the Supreme Court of that state, and they have held that the board of county commissioners has no power to incur liability for the county, which, with the ordinary current yearly expenses and other liabilities payable within a year, will exceed both the amount of funds in the county treasury and the maximum amount which can be assessed as one year's taxes for county purposes according to the tax lists on file when the contract is made under which the liability will be incurred. Nor can the board, in addition to anticipating the above resources, in incurring liability also anticipate uncollected taxes. It has no power to anticipate in a year more than a year's uncollected taxes assessed at the maximum rate. They held further that, under the general laws of that state, a board of county commissioners has no power to issue bonds for the erection of a court house.[1] The same court in a recent case held that a contract made by the city council of a leading city of that state for lighting its streets for a term of five years was, under its charter, void, unless the funds on hand and the taxes actually levied when the contract was made were sufficient to cover all the liability incurred by the contract and payable during the five years, and also to cover the current expenses and other existing liabilities of the fiscal year for which such taxes were levied; further, the conditions required to make the contract valid were so exceptional that its validity would not be presumed.[2] The United States Circuit Court for

[1] Rogers *v.* Board of Comrs. of Le Sueur County, (Minn. 1894) 59 N. W. Rep. 488. See, also, Johnston *v.* County of Becker, 27 Minn. 64; s. c., 6 N. W. Rep. 411.

[2] Kiichli *v.* City of Minneapolis, (Minn. 1894) 59 N. W. Rep. 1088. The court, after reciting the various sections of the charter regulating the financial conduct of the city's affairs, said: "It is urged that making a contract this year, to be performed in part this year, in part next year, and in part the year after, and paid for only as performed, is not incurring liability at the time the contract is made, as the tax will be levied before the debt is created; that is, before the liability matures. To this it may be answered that a liability is incurred when the contract is made. The point here involved is disposed of in the cases of Johnston *v.* County of Becker, 27 Minn. 64; s. c., 6 N. W. Rep. 411, and Rogers *v.* Board of Comrs., (Minn. 1894) 59 N. W. Rep. 488, where the court held that a liability was incurred when the contract was made, though not to be performed, or the performance paid for, until after the taxes of subsequent years would be available to pay it. There the county commissioners were limited in incurring liability to the maximum amount which could be levied in one year according to the tax lists then on file.

the western district of Missouri has held that the charter provision forbidding the council of a city to appropriate any money in excess of the revenue for the fiscal year actually collected or to bind the city by any contract or act in any liability until a definite sum shall first be appropriated for the liquidation of all liability flowing therefrom, did not apply so as to prevent the council accepting a devise of lands for a public park, subject to an annuity to the widow of the devisor during her life, which annuity was paid by annual appropriation from the general fund, as the council was vested by other provisions of the charter with ample powers to acquire land for this purpose, either by devise, or by actual purchase, to be paid for out of the general funds in annual installments.[1]

§ 259. **Incurring a debt without provision by taxation for interest and sinking fund.**— A city in Texas contracted for the building of a bridge, agreeing to pay a certain sum therefor, one-half on delivery of the material and the remainder on completion and acceptance of the bridge. This contract was held in the United States Circuit Court to create a debt within the constitutional provision that no city shall create any debt unless at the same time provision be made by taxation for payment of interest and creation of a sinking fund. The contract was, therefore, in case no such provision was made for interest and sinking fund, held invalid, notwithstanding payment of the contract price was secured by the proceeds, paid into the city treasury, of bonds issued for that purpose in accordance with the provisions of the charter of the city requiring creation of a fund for payment of interest and as a sinking fund by special tax; also, it was held that a debt created by such contract could not be regarded as a current expense of the city payable out of current revenues. And there could be no recovery upon a contract void as in contravention of the constitutional provisions of the value of the bridge as upon an implied contract.[2]

Here the limitation is more stringent. It limits the city council, in incurring liability, to the amount of the tax 'actually levied' at the time the liability is incurred."

[1] Budd *v.* Budd, (1894) 59 Fed. Rep. 735.

[2] Berlin Iron Bridge Co. *v.* City of San Antonio, (1894) 62 Fed. Rep. 882. See City of Corpus Christi *v.* Woessner, 58 Tex. 462; Biddle *v.* City of Terrell, 82 Tex. 335; s. c., 18 S. W. Rep. 691; City of Terrell *v.* Dessaint, 71 Tex. 773; s. c., 9 S. W. Rep. 593;

§ 260. Employment of an agent to negotiate bonds.— In a late California case the action was against a county by one upon a contract with the county board to secure bids for county bonds. The Supreme Court held the employment of this person by the county board for this purpose to be a void act, and that his acts in pursuance of such employment, however beneficial they may have been to the county, created no liability against it.[1]

Bell *v.* Live Stock Co., (Tex.) 11 S. W. Rep. 344; City of Bryan *v.* Page, 51 Tex. 532.

[1] Smith *v.* County of Los Angeles, (1893) 99 Cal. 628; s. c., 34 Pac. Rep. 439. Upon the power of the county board to make this contract, the court in discussing the point states the following provision of the "County Government Act" of that state: Section 25 of the act provides that "the board of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law," to create a bonded indebtedness and to issue bonds of the county, as provided by section 37 of said act, and subdivision 14 of section 25 provides that "whenever bonds issued under this chapter shall be duly executed * * * they shall be delivered to the county treasurer, and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same or exchange them under the direction of the board of supervisors. * * * He shall also keep a record of bonds sold or exchanged by him, * * * and shall also report, under oath to the board, at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange * * * and the amount of accrued interest received by him on such sale or exchange, * * * but such bonds shall not be sold or exchanged for any indebtedness of the county, except by the approval of the board of supervisors of said county. No sale shall be made of any such bonds except to the highest bidder, after advertising bids for the purchase of the same" in the manner prescribed. And subdivision 35 of the same section empowers the board "to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." Section 6 of the same act provides that "all contracts, authorizations, allowancos, payments and liabilities to pay, made or attempted to be made in violation of this act, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. * * *" And section 36 thereof provides that "the board must not for any purpose contract debts or liabilities except in pursuance of law." The court then said: "It is clear that these provisions of the statute confer no express power upon the board of supervisors to make such a contract as the one sought to be recovered on in this action; and unless it can be implied from subdivision 35 referred to, then it follows that no such power exists, and the contract sued on is, therefore, void, because not made in pursuance of law. As the [County Government Act] distinctly enumerates the acts which the board is required to perform with reference to the issuance and disposal of county bonds; and, as the employment of a procurer of bids for bonds delivered

§ **261. Investment of sinking funds.**— The Supreme Court of Illinois refused a writ of *mandamus* to compel the treasurer of a county to invest funds of the county, held as a sinking fund, to pay legally issued bonds of the county, in certain other securities of the county, as directed by a resolution of the board of county commissioners. In the opinion they state that the contention of the petitioner was, that there was an implied power in the board to order such investment, embraced in the provision conferring upon county boards power "to manage the county funds and county business, except as otherwise specially provided." Of this contention, the court said: "This cannot be understood to give to county boards the absolute and unlimited power of management of county funds, where there is the absence of any specific provision of law to the contrary. It hardly means more, we think, than a power to manage the county funds and county business according to law. See Rothrock *v.* Carr, 55 Ind. 334. We certainly cannot allow to it any such scope as giving a general power to county boards to invest surplus funds in the county treasury in such manner as they shall see fit. So far from there being any provision of law which, in express words, or by necessary implication, authorizes the action taken by the county board in this case, section 39, 'that whenever a tax is levied for the payment of a specific debt, the amount of such tax collected shall be kept as a separate fund in the county treasury, and expended only in the liquidation of such indebtedness,' would seem to prohibit the doing of what has been here attempted. We would not be understood, however, as applying this provision with such strictness as to deny all power of investment what-

to the treasurer for sale or exchange under the law was not in any way necessary to the full discharge of the legislative authority of the county government, no such implied authority to make such a contract was conferred upon the board as contended for. The board of supervisors cannot sell or negotiate the sale of its county bonds. That power is expressly conferred by statute on the county treasurer, and is to be exercised by him under the direction of the board, and the sale or exchange of bonds by him is made subject to the approval of the board; in other words, the bid for the bonds is solicited and obtained upon the advertisement by the treasurer for such bid, and the law recognizes no other mode of procurement. The treasurer alone procures the bid, the mode and manner of such procurement being specifically pointed out by statute. The making of the contract in question by the board of supervisors was an unwarranted, if not a pragmatical, interference with the power and duties of the county treasurer as expressly conferred and defined by law."

ever of the moneys of a sinking fund, and compel them to remain *in specie* in the county treasury, and lie idle and unproductive until required to be applied to the purpose for which they were raised. In Union Pacific Railroad Co. *v.* The United States, 99 U. S. 700, the court remark: 'The duty of the manager of every sinking fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available.'" The Illinois court then continued: "An investment, for instance, in the public funds of the United States is, all know, so readily convertible into money, that it would be, essentially, the equivalent of money. Such an investment, we are not prepared to say, would be incompatible with the requirement that the money represented by such investment should be kept as a separate fund in the county treasury, and expended only in liquidation of the indebtedness it was raised to pay. But the same cannot be affirmed of county securities, as to their being the representative of money. Constant experience shows that the promises to pay of a county are quite different from being the equivalent of money in hand."[1] A Texas city, having determined by its council, to invest certain sinking funds, in the hands of its treasurer, in bonds of the city of another series, gave certain warrants for the amount to the parties through which it proposed to make the investment against those sinking funds. The treasurer declined to honor them. The city then brought its writ to compel him, by *mandamus* to pay, as directed, these warrants. He resisted upon various contentions. Among others, was this contention: That, if the city could invest these funds otherwise than in paying off and canceling the bonds themselves, it could not invest them in the purchase of its own outstanding bonds of another series, because a purchase by a debtor of a debt against himself *ipso facto* works a cancellation thereof. Over this contention the Court of Appeals of that state held that the power to invest in its own bonds of another series existed in the city.[2]

[1] Cook County *v.* McCrea, (1879) 93 Ill. 236, 239, 240.

[2] Elser *v.* City of Fort Worth, (Tex. Civ. App. 1894) 27 S. W. Rep. 739. *Arguendo*, the court said: "It must be conceded that [the statement of the contention] is a correct statement of the law in its application to ordinary cases in which the purchase is made by the debtor in the same capacity in which he owes the debt, but even in such cases, it is very easy to keep the security alive by having the creditor make a transfer to a third party. 1 Jones' Mortg. 943–946. Also, see Jones' Corp. Bonds & Mortg. 325, where it is said: 'A company may purchase its own bonds as an investment,

§ 262. Contract with corporation attorney for legal services.—The question of whether the commissioners of a county in Pennsylvania were authorized to make a contract with the county solicitor to take proceedings to obtain credit for the county in its accounts with the commonwealth for all unpaid taxes on personal property, for which he was to have as compensation twenty-five per centum upon the amount or amounts which might be credited, received the full consideration of the Supreme Court of that state, and they held that such contract was *ultra vires.*[1] The Supreme Court of Kansas has held a contract made

and reissue them. If the facts show that there was no intention of paying the bonds, but they were regarded and reputed by the company as still outstanding, they are valid in the hands of a subsequent purchaser, and are secured by the lien of the mortgage.' But, be this as it may, it will hardly be contended that if the purchase be made in a different capacity than that in which the debt is owed (for instance, if A., as trustee, should, with the trust fund, purchase a debt which he owes as an individual), the rule would apply, and we are of opinion that as to those funds set apart for special purposes, both by the law and by the ordinances passed by the city council, as in this case, the city must be regarded as a trustee purchasing with the trust fund a debt which it owes as an individual, and that the debt so purchased is not canceled, but is kept alive for all purposes, and becomes the property of the *cestui que trust* — the special fund — just as the house and lot taken from a defaulting collector was said by our Supreme Court, in the case of City of Sherman *v.* Williams, 84 Tex. 421; s. c., 19 S. W. Rep. 606, to become the property of such a fund. We think this view receives striking illustrations in numerous provisions of our Constitution and laws, authorizing the investment of special funds, such as the university and public school funds, held by the state; in its own bonds, and by the different counties in their own obligations. We believe that it has never been contended that a purchase of this kind cancels the bonds thus acquired. We do not regard the opinions in the cases of Bank *v.* Grace, 102 N. Y. 313; s. c., 7 N. E. Rep. 162, and Wilds *v.* Railroad Co., 102 N. Y. 410; s. c., 7 N. E. Rep. 290, as conflicting herewith. Those decisions were controlled entirely by the statutes and ordinances therein construed, which were quite dissimilar to the provisions contained in the charter of this city."

[1] County of Lancaster *v.* Fulton, (1889) 128 Pa. St. 48. The court, speaking through STERRETT, J., said: "In substance, the defense interposed by the county was, that at the time the resolution [referring to the contract] was adopted plaintiff below 'was the duly elected and qualified solicitor' of the county, serving under the act of February 18, 1870, at a salary of five hundred dollars, fixed by that act; and, for that reason, neither he nor the county commissioners had any power or authority to enter into the contract, under which the services were rendered and on which the claim is founded. It is conceded that when the contract was made and for a considerable time thereafter plaintiff below was the duly elected and qualified solicitor of the county. The

by the board of county commissioners for the county with attorneys at law, for their services as such, which services the law requires the county attorney to perform, *ultra vires* and void.[1]

§ 263. Discount of its warrants by a corporation.— A county in North Dakota created from portions of two other

4th section of the act under which he was elected declares: 'The salary of the officer elected as hereinbefore provided shall be five hundred dollars per annum, payable quarterly; and the officer so elected shall be the legal adviser of the board of commissioners of Lancaster county, and shall represent the said board in all proceedings in law or equity wherein the said county is a party or has any interest.' He was undoubtedly a public officer within the meaning of the Constitution, article III, § 13, and article XIV, §§ 1 and 5, the first of which declares: 'No law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment.' The services for which the contract in question undertakes to provide are clearly within the sphere of the duties of the 'solicitor of Lancaster county' as defined by the act of February 18, 1870. He 'shall be the legal adviser of the board of commissioners of Lancaster county and shall represent the said board in all proceedings in law or equity wherein said county is a party or has any interest.' What authority then had either the plaintiff below or the county commissioners to enter into a contract to compensate the former for services within the sphere of his duties as solicitor of the county? We are of opinion that they had none; that the act of the commissioners in undertaking to bind the county to pay the compensation provided for in the contract was *ultra vires*. Doubtless the very object of the act in creating the office of county solicitor, providing for his election and fixing his salary, etc., was to take the power out of the hands of the county commissioners and place it beyond their reach. But, be that as it may, we think the contract was *ultra vires* and void. * * *" Further on, referring to the trial judge's charge, it is said: "In saying, as he correctly did, that if the services of plaintiff below 'had been rendered while he was county solicitor, then there could be no recovery,' the learned judge rightly assumed that the contract in question was unauthorized and illegal. All such contracts, whether intended to be so or not, are in effect evasive and subversive of law, contrary to public policy, and, therefore, void. They are no more capable of ratification than was the contract in Hunter *v.* Nolf, 71 Pa. St. 282. Speaking of the illegal contract under consideration in that case, Mr. Justice SHARSWOOD said: 'It is undisputed law that such a contract is illegal as against public policy and cannot be enforced. Even if there had been an express contract on entirely different terms than those agreed upon before, it ought to be viewed with a considerable degree of suspicion as an attempt to evade a sound and salutary rule of public policy.' A case more nearly parallel with this in some of its features is Chester County *v.* Barber, 97 Pa. St. 455. Barber, one of the plaintiffs below, was attorney for the county of Chester, but it did not appear whether he was serving under an annual salary

[1] Waters *v.* Trovillo, (1891) 47 Kans. 197.

counties, though its board of commissioners, made a contract with one to make a transcript of the records of those two counties so far as they affected the territory embraced in the new county at an agreed price for which he was to be paid in a county warrant for such a sum as, at the prevailing discount of such warrants, would raise the amount which was to be paid him. The validity of these warrants issued by the county was contested in the courts. The Supreme Court held the warrant to be wholly illegal and void from its inception, for the reason that the county commissioners, in the absence of legislative authority, either general or special, to do so, were without power to enter into such an arrangement.[1] One of the warrants sued on in this case repre-

fixed by act of assembly or under a special agreement with the commissioners. The county commissioners, however, made a contract with him and two other attorneys to pay them fifty per centum of the amount they recovered from the state for taxes improvidently paid into the state treasury. Speaking for the court, the present chief justice said: 'The commissioners had no power to bind the county by such a contract. * * * It was against public policy, and, therefore, null and void. * * * These commissioners were acting in a fiduciary character. They were but trustees of the money when received for the use of the county. When, therefore, they contracted to give one-half of it to the plaintiffs for their services they exceeded their power. They were giving what did not belong to them. As well might a trustee contract to give away one-half of the trust estate as compensation to counsel for services in connection therewith. And, if he may give away one-half, why not three-fourths, or even a greater proportion? Can it be doubted that a court of equity would strike down such a contract as improvident and a legal fraud? * * * Whether the plaintiff Barber can recover anything will depend upon the terms of his previous engagement as solicitor to the commissioners.' If it had appeared in that case that Barber was acting under a salary, fixed by act of assembly (as was Mr. Fulton in this case), and that his defined duty was to act as a legal adviser of the commissioners and represent them in all proceedings at law or in equity wherein the county had any interest, it is not likely that any doubt as to his legal status would have been suggested. According to the reasoning of the opinion the contract as to him would have been declared illegal, contrary to public policy, and absolutely void. We are, therefore, of opinion that the learned judge erred in holding that plaintiff below might recover if the commissioners recognized his services after the expiration of his term of office as county solicitor; that such recognition would be a ratification of the original illegal agreement, etc."

[1] Erskine *v.* Steele County, (N. D. 1894) 60 N. W. Rep. 1050. The holders of the warrant cited specially in support of their position the case of Kilvington *v.* City of Superior, 83 Wis. 222; s. c., 53 N. W. Rep. 487. The Supreme Court of North Dakota referred to that case in these words: "In [that case] the court held that

sented entirely the discount of the warrant which was issued to the contractor for transcribing the certain records of the two counties from which this county was created. This warrant the Supreme Court of North Dakota held also to be wholly illegal and void for the reason that the county commissioners were without power to enter into an agreement for such discount.[1]

the general power conferred upon village trustees to 'appoint a board of health to prevent the deposit of unwholesome substances, and prevent or abate nuisances, is sufficient to authorize a contract for the erection of a crematory for the consumption of any matter calculated to affect the health or comfort of the community.' The reason of this holding is plain. While the authority to erect a crematory was not expressly conferred by the legislature upon the trustees, such authority was implied if necessary in carrying out the power to abate nuisances, etc., which power was given in clear terms. But we see no analogy in the case cited to the case at bar. The right to enter into such a contract, as that concluded with the [one who did the transcribing] was not expressly conferred upon the commissioners, nor was such authority necessary or at all appropriate to the execution of any power vested in the commissioners by any law of the territory then existing. In the absence of legislative authority authorizing it any such contract was, in our opinion, clearly *ultra vires* in character. We, therefore, hold that the warrant was wholly void from its inception. It was issued without authority of law and upon no legal consideration. Rasmusson *v.* County of Clay, 41 Minn. 283; s. c., 43 N. W. Rep. 3; Pugh *v.* Good, 19 Or. 85; s. c., 23 Pac. Rep. 827."

[1] Erskine *v.* Steele County, (N. D. 1894) 60 N. W. Rep. 1050. Upon this branch of the case, the court said. "Essentially the same question has been frequently presented to courts in other jurisdictions, and the authorities, so far as we have examined them, are unanimous in condemning such discount transactions. Judge DILLON, in his learned treatise upon Municipal Corporations (Vol. 1 [4th ed.], § 503), says: 'Without express authority from the legislature, a municipality cannot discount its warrants for more than the sum actually due the claimant, and as to the excess they are void, and the holder will be treated only as the equitable assignee of the valid, legal claim of the payee.' In Foster *v.* Coleman, 10 Cal. 278, a claim for services to the amount of $1,650 was allowed by the board of supervisors. County warrants of the county were then at a discount, and worth only forty cents on the dollar. The board ordered a warrant to issue for a sum which, at this prevailing discount, would sell for $1,650, the amount due the claimant. Upon such order the warrant issued. A taxpayer of the county brought suit and the county treasurer was enjoined from paying the warrant. The Supreme Court, in the course of its opinion, referring to the order of the board directing the warrant to issue, said: 'The effect of the order was to create a debt or liability on the part of the county, and this the supervisors were not empowered to do for any purpose except as provided by law. Their action was entirely without authority, and altogether indefensible.' The settlement and allowance of an illegal claim against the county when made by a county

§ 264. Illustrations of ultra vires acts.— Furnishing aid to a gravel road or turnpike company in building or repairing its road at the expense of a county, or entering into contracts with them for the future repairs of a bridge or the approaches of a bridge, being beyond the powers of a county, a board of commissioners of a county have no authority to make contracts for such purposes.[1] Without enabling authority a municipal corporation cannot purchase lands and lots at a tax sale. Such a power is not included in a general authority to buy and hold real estate for the convenience of the corporation.[2] But where a municipal

board, has no more conclusive effect than such an adjustment would have if made by private persons. See Commissioners *v.* Keller, 6 Kans. 511. In a recent case clearly in point, the Supreme Court of the state of Washington, in referring to the act of a municipality in discounting its own warrants, uses the following language: 'Such a proceeding is manifestly beyond the scope of legitimate corporate power, and a practice of that character might lead to various results. City warrants are evidence of indebtedness, or promises to pay, and are payable with interest prescribed by law; and the corporation cannot cast upon the taxpayers any further burden in respect thereto, and the courts have uniformly, as far as we are advised, disapproved of any effort to do so.' Arnott *v.* City of Spokane, 6 Wash. St. 442; s. c., 33 Pac. Rep. 1063. See, also, Clark *v.* Des-Moines, 19 Iowa, 199; Bauer *v.* Franklin County, 51 Mo. 205; Shirk *v.* Pulaski County, 4 Dill. 209: s. c., Fed. Cas. No. 12,794." See Pugh *v.* City of Little Rock, 35 Ark. 75.

[1] Driftwood Valley Turnpike Co. *v.* Board of Comrs. of Bartholomew County, (1880) 72 Ind. 226. The court said: "In the case of Harney *v.* Indianapolis, etc., R. R. Co., 32 Ind. 244, it was held that a county had no power, without affirmative legislation, to make an appropriation from its treasury by way of donation to a railroad company to aid in the construction of its road. The court, among other things, said: 'The counties are corporations created for the purpose of convenient local municipal government, and possess only such powers as are conferred upon them by law. They act by a board of commissioners whose authority is defined by statute. One of the powers conferred is to collect taxes levied upon the people and property within the county. In the disposition of the money thus collected into the general treasury the board has not unlimited discretionary choice as to the objects upon which it shall be expended. It can only be applied to certain specified objects, and the building of railroads is not one of these objects, or necessary to carry into effect any of the purposes for which such corporations were created.' In Burnett *v.* Abbott, 51 Ind. 254, the county board made a contract conditionally to pay certain expenses of boring wells for oil and digging for minerals. The contract was held void for want of authority to enter into it. Nor can the board appropriate the funds of the county to the payment of the debts of a county agricultural joint-stock company or to the building of school houses. Warren County Agricultural Joint-Stock Co. *v.* Barr, 55 Ind. 30; Rothrock *v.* Carr, 55 Ind. 334."

[2] City of Champaign *v.* Harmon, (1881) 98 Ill. 491. It was said by the

corporation is vested with general authority to purchase real estate for any purpose, a vendor of land to a municipal corporation will not be allowed to avoid his contract by insisting that his deed is void, because the corporation may have exceeded its powers in making such purchase.[1] In a case before the Supreme Court of Alabama, an action to enforce a penal bond given by a

court: "Municipal corporations are creatures of the statutes, and can only exercise such powers as are expressly conferred, or such as arise, by implication, from general powers granted. In this case the plaintiff corporation is empowered by its charter to buy and hold real property, but that must be understood to be purchases made in the ordinary way, and only for corporate purposes, and a grant to purchase real property for particular purposes would seem to be a limitation on the powers of such corporations, and would exclude, by necessary implication, all purchases for mere speculation or profit. Power to purchase real estate for speculative purposes is not among the usual powers bestowed on municipal corporations, nor does such power arise, by implication, from any of the ordinary powers conferred on such corporations. Authority to buy and hold real estate is only given to them to that extent that may be necessary to carry into effect corporate powers granted. Under a general grant of power to buy and hold real property, it is understood municipal corporations may buy and hold such property, within the corporate limits, as may be necessary for corporate purposes, and may even buy and hold real estate beyond the corporate limits, for the location of cemeteries, pest houses and other purposes connected with the sanitary condition of the municipality."

[1] City of Champaign *v.* Harmon, (1881) 98 Ill. 491. In Halstead *v.* Mayor, etc., of New York, (1850) 3 N. Y. 430, the Court of Appeals of New York held that it was beyond the power of the corporation to assume the defense of suits brought against the county supervisors individually for the penalty incurred by them for neglecting the duty of auditing the salaries of certain judges appointed under a statute which they assumed to be unconstitutional, and was afterwards held to be unconstitutional, or to pay the judgments and costs recovered against those supervisors, upon the principle that such corporations are creatures of limited powers, especially upon the subject of the appropriation of the funds of the people, as settled in Hodges *v.* City of Buffalo, 2 Den. 110. *Ultra vires* contracts of municipalities: Bourdeaux *v.* Coquard, 47 Ill. App 254; Sang *v.* City of Duluth, (Minn.) 59 N. W. Rep. 878; City of Aberdeen *v.* Honey, 8 Wash. 251; s. c., 35 Pac. Rep. 1097; Penley *v.* City of Auburn, 85 Me. 278; s. c., 27 Atl. Rep. 158; East St. Louis Gas Light & Coke Co. *v.* City of East St. Louis, 47 Ill. App. 411; Hayward *v.* Board of Trustees of Town of Red Cliff, (Colo.) 36 Pac. Rep. 795; Town of Newport *v.* Batesville & B. Ry. Co., 58 Ark. 270; s. c., 24 S. W. Rep. 427; Lamar Water & Electric Light Co. *v.* City of Lamar, (Mo.) 26 S. W. Rep. 1025; Griswold *v.* City of East St. Louis, 47 Ill. App. 480; Hamilton *v.* City of Shelbyville, 6 Ind. App. 538; City of Nashville *v.* Sutherland, 92 Tenn. 335; State *v.* City of Bayonne, 55 N. J. Law, 268; Hintrager *v.* Richter, 85 Iowa, 222; Bateman *v.* City of Covington, 90 Ky. 390.

private corporation to a municipal corporation for the faithful application by the private corporation of bonds of the municipal corporation loaned by it, without authority under its charter, to aid in the construction of the works of the private corporation, the bond was held to be invalid and not enforceable by suit; further, that its validity was not affected by the subsequent sale or transfer of the municipal bonds by the private corporation, and that the private corporation contracting with the municipal corporation for the construction of works which the latter had no authority to construct and had received the benefit of the contract, was not estopped when sued by the municipality from setting up its want of authority to make the contract.[1]

§ 265. Estoppel of a public corporation to deny its liability on an ultra vires contract.— A manufacturing corporation which furnished school furniture to a school district of Kansas brought its action against the district to recover the value of the goods sold and delivered to it. It appeared in the pleadings and record before the Supreme Court, that the court below took the view that the written order set up in the petition, and, also, the written contract made by the board of directors with the agent of the plaintiff for the furniture, were void because unauthorized. The Supreme Court, having referred to the findings of the court below that the furniture had been in use by the school district for a period of nearly five and a half years, said: "It may be conceded, for the purpose of this case, that both these written instruments were void, and that no action could be maintained on either or both of them, yet the defendant district, having received and retained the property, which the court finds to have been fairly worth the price stated in the written contract, is

[1] City Council of Montgomery *v.* Wetumpka Plank Road Co., (1857) 31 Ala. 76. The court said: If the [doctrine *contra* the text] be established, these corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers and their very usurpations have the effect of conferring powers on them which the legislature have withheld. A proposition so erroneous can scarcely need argument to overturn it. See on this point Pennsylvania, Delaware & Maryland Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 319, 320, and authorities cited; Albert *v.* Savings Bank of Baltimore, 1 Md. Ch. Dec. 407–413; Smith *v.* Ala. Life Ins. & Trust Co., 4 Ala. 558; Hodges *v.* City of Buffalo, 2 Denio, 110; Life & Fire Ins. Co. *v.* Mechanic Fire Ins. Co., 7 Wend. 31; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560.

bound, in common honesty, to pay for it. During all the time this furniture has been in the possession of the defendant district, it is fair to presume that the school house which was furnished with the seats and desks purchased from the plaintiff, was used in the same manner as school houses are ordinarily used. It is fair to presume that school district meetings were therein held annually at the time appointed by law. It is fair to presume that the school district board met there and caused the seats to placed in the building and to be used by the district. The board and the residents of the school district must all have known of the use of this property, and their continued retention and use of it shows a perfect and complete ratification of the purchase made by the district officers." In the case of Sullivan *v.* School District, 39 Kans. 347, it was held that a contract for the construction of a school house, made by one member of the school district board alone, on behalf of the district, might be ratified and made binding on the whole school district. This case came again before this court, and is reported in 48 Kans. 624, and the court then held that: "A contract for building a school house, void because made only by one member of the school board, may be ratified and made binding by the action of the school district in completing the building left unfinished by an absconding contractor, by furnishing the same with seats, desks and other necessary school house furniture, by occupying the same for school house purposes, and by insuring the same."[1] A bill was filed by a taxpayer in Iowa against the vendor of land sold to a county for a poor house farm, the county treasurer and supervisors, to which the county was not made a party, to have the contract set aside as being *ultra vires*, and the treasurer enjoined from paying certain warrants issued for the residue of the purchase money (the county having paid a part of the purchase money and been placed in possession). The Supreme Court held that the bill was not maintainable in a court of equity, because such a decree would be inequitable while the county was allowed to retain the land, and its title could not be disturbed in an action to which it was not a party.[2] A corporation which has enjoyed the provis-

[1] Union School Furniture Company *v.* School District No. 60, in Elk County. (1893) 50 Kans. 727, 730, 731.

[2] Turner *v.* Cruzen, (1886) 70 Iowa, 202; s. c., 30 N. W. Rep. 483. The court said: "It appears to us to be well settled as a rule, with one exception, that, where the consideration received by a corporation under an *ultra vires* contract can be restored, a

ions of a lease from a city, cannot, in an action for rent, claim that neither it nor the city had power to execute the lease.[1] It was insisted in an Indiana case that as a county had received the full benefit of a contract which it was beyond its power to make, it was estopped to set up that it was *ultra vires*, and to sustain this position counsel relied upon State Board of Agriculture *v.* Citizens' Street Railway Company, 47 Ind. 407. The Supreme Court said: "That, however, was the case of a private corporation, the street railway company, that sought to avoid its obligation on the ground of want of power to make the contract. There is a broad difference between a private corporation organized for a private purpose, though subserving a public interest, and a public corporation, like a county or city, organized for public purposes only, and whose obligations must be paid from public funds raised for public purposes only. The latter class of corporations may always defend, on the ground that the supposed contract was outside of the authority conferred on it by law. In

court of equity will not relieve the corporation, as against the contract, without providing for a restoration of the consideration. Pratt *v.* Short, 53 How. Pr. 506; Leonard *v.* City of Canton, 35 Miss. 189; Argenti *v.* San Francisco, 16 Cal. 255, 282; Moore *v.* Mayor, etc., of New York, 73 N. Y. 238; Lucas County *v.* Hunt, 5 Ohio St. 488." Afterwards it was said: "We are aware that there is a class of cases where courts of equity declare a contract *ultra vires*, and grant relief in favor of a corporation, without any decree for the restoration of the consideration received by the corporation. This is so where municipal bonds have been issued in excess of the constitutional limit of indebtedness, and the money obtained thereon has been expended. Courts of equity decree the cancellation of such bonds, or enjoin payment, without decreeing repayment to the bondholders of the money received by the corporation on the bonds. But this results from the necessity of the case. If the courts should decree repayment, the very object of the constitutional provision would be defeated."

[1] City of Corpus Christi *v.* Central Wharf & Warehouse Co., (Tex. Civ. App. 1894) 27 S. W. Rep. 803. The court said: "There was nothing [in this lease contract] immoral or illegal, in the sense of an infraction of a positive prohibition of law, in the action of either party. At most, their action was in excess of the powers conferred. The restrictions upon the powers of the city government are imposed by law for the protection of the inhabitants of the city and the general public. By proper proceedings, taken by the right parties in due time, all such transgressions of power may be promptly remedied. But, when such contracts have been allowed to stand until fully carried out, it does not lie in the mouth of the party who received their benefits to urge the defense of *ultra vires*." See Bigelow Estop. 465; 7 Am. & Eng. Encycl. Law, 29; Beach Priv. Corp. §§ 421–426, 432, 433. As to a taxpayer having no right to complain of an illegal

1 Dillon Munic. Corp. § 381, the author, after stating the general doctrine, that the officer of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, says: 'It results from this doctrine that unauthorized contracts are void, and in actions thereon, the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter, or constituent statute, to enter into the contract.'"[1] A county is not estopped as against a warrant issued by one of its officers, from setting up the defense of *ultra vires*.[2] The Kansas Supreme Court has said, upon this matter of estoppel of a corporation: "The tendency of the courts and others, at the present time, is to treat corporations, including municipal corporations, with respect to their business transactions, about the same as the courts and others treat individuals, and where a corporation, municipal or otherwise, has received benefits from others, upon contracts *ultra vires* or void because of some irregularity or want of power in their creation, but not void because made in *violation* of express law, or good morals, or public policy, and where the corporation retains such benefits, it must pay for them."[3] Where the acts of a municipal corporation are such as the corporation is prohibited from performing, they will be *ultra vires* and void, and the corporation and its taxpayers will not be estopped from insisting upon such invalidity even as against parties acquiring rights without knowledge of the fact.[4]

§ 266. Estoppel of contractor with a public corporation to enforce an ultra vires contract.—In an action by citizens and taxpayers of a town to restrain a contractor from enforcing a judg-

contract on the part of a city, such contract being voidable only at the option of the city, see Waco Water & Light Co. *v.* City of Waco, (Tex. Civ. App. 1894) 27 S. W. Rep. 675.

[1] Driftwood Turnpike Co. *v.* Board of Comrs. of Bartholomew Co., (1880) 72 Ind. 226.

[2] Webster County *v.* Taylor, 19 Iowa, 117. In Woodruff *v.* Commissioners of Noble County, (Ind. App. 1894) 37 N. E. Rep. 732, it was held that a county physician could not contend that a contract by the board with the county medical society, for medical treatment of the poor of the county, was *ultra vires* the society and did not bind its members.

[3] Board of Comrs. of Hamilton County *v.* Webb, (1891) 47 Kans. 104, 105, 106; citing City of Ellsworth *v.* Rossiter, (1891) 46 Kans. 237, 242; Comrs. of Leavenworth Co. *v.* Brewer, 9 Kans. 307; Huffman *v.* Comrs. of Greenwood County, 23 Kans. 281.

[4] McPherson *v.* Foster, 43 Iowa, 48.

ment against the town obtained by default and to restrain the town and its officers from paying this contractor anything upon his alleged contract upon which the judgment was rendered, it being alleged in the complaint that the judgment was obtained through the connivance of the officers of the town, it appeared that the town was empowered by its charter to levy special assessments for opening and grading streets upon the real estate in front of, or adjacent to, which such improvements should be made. A later act provided for the assessing of the costs of such improvements in the first instance upon the property deemed to be benefited thereby; and, further, it was provided in this later act that the town council should "order said improvements to be made by the owners of real estate, or occupants of such real estate, in front of or adjacent to where said improvements are so ordered." There was a further provision that such owners or occupants "shall make or cause to be made said improvements at their own cost and charges," and that in case of their default the council may cause the improvements to be made and assess the expense upon the property. It was not controverted that the statute required that an order should have been made for the adjacent proprietors to make the improvement and opportunity given them to do so before the council could rightfully let a contract for doing it, and it was admitted that this was not done. Whether this contract was *ultra vires*, and whether the municipality should be heard to interpose that defense to an action by the other party to recover upon the contract after it had been performed, were the points considered by the Minnesota Supreme Court. The court held that the contract was unauthorized, and that, not having been misled by any fact, the contractor was not entitled to recover on such contract.[1] The court, after stating the powers of the corporation, and restrictions upon the same, said: "Not only was the party entering into this contract legally chargeable with notice that by the public charter the authority of the council was thus restricted (McDonald *v.* Mayor, 68 N. Y. 23; Schumm *v.* Seymour, 24 N. J. Eq. 143), but the allegation in the complaint that the plaintiff warned the defendant that the contract was void before he commenced to perform it, is admitted by the answer. The doctrine of *ultra vires* has with good reason been applied

[1] Newbery *v.* Fox, (1887) 37 Minn. 141; s. c., 33 N. W. Rep. 333, affirming the sustaining of a demurrer to the answer of defendant.

with greater strictness to municipal bodies than to private corporations, and in general a municipality is not estopped from denying the validity of a contract made by its officers when there has been no authority for making such a contract.[1] A different rule of law would, in effect, vastly enlarge the power of public agents to bind a municipality by contract, not only unauthorized but prohibited by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent. In the case here presented it is not to be denied that the town council had no authority to make this contract; that the charter set forth the conditions which would authorize such a contract to be made; that those prescribed conditions had not been fulfilled, nor did the defendant believe that they had been. The most that appears in his favor is that, without being misled or mistaken as to the fact, but being warned that the contract was void, he nevertheless judged that it was legally valid; and, being also advised by the members of the council, he took the risk of performing it. The contract being thus unauthorized was not effectual as a contract, and the defendant does not appear in a position entitling him to invoke the doctrine of estoppel to aid him in enforcing the claim as though the contract was obligatory upon the town." The Supreme Court of Colorado has held that the provision of the charter of the city involved declaring that neither the city council nor any officer of the city shall make any contract or do any thing binding or imposing upon the city any liability to pay money as upon contract until a definite appropriation shall be made to meet the requirements or consequences of such contract, was mandatory, and the ditch company furnishing the water for the necessary uses of the city could not recover against the city the reasonable price for the use of the water in the absence of such a definite appropriation.[2]

[1] Citing Mayor *v.* Ray, 19 Wall. 468; Brady *v.* Mayor of New York, 20 N. Y. 312; Hague *v.* City of Philadelphia, 48 Pa. St. 527; 1 Dill. Mun. Corp. 457; Nash *v.* City of St. Paul, 8 Minn. (172).

[2] Smith Canal or Ditch Co. *v.* City of Denver, (Colo. 1894) 36 Pac. Rep. 844. The court referred to the cases of Argenti *v.* City of San Francisco, 16 Cal. 255; Nelson *v.* Mayor, 63 N. Y. 535, quoting from the opinion of Folger, J., in the latter, and cited further, McDonald *v.* Mayor, 68 N. Y. 28; Smith *v.* City of Newburgh, 77 N. Y. 130; McCoy *v.* Briant, 53 Cal. 247;

§ 267. Injunction of public officials — rules.— The Supreme Court of Washington has held in a taxpayer's action against the commissioners of a county, that the taxpayer was entitled to an injunction to restrain them from issuing certain bonds as the debt proposed to be increased was beyond the limitation of indebtedness which the corporation was allowed to incur and had not been properly ratified or validated, and, further, the arrangement with a trust company for the sale of the bonds, by which the latter was to be allowed commissions, etc., of a large amount, violated the requirement of law that they should not sell the bonds below par.[1]

People *v.* May, 9 Colo. 80; s. c., 10 Pac. Rep. 641. When one benefited by a contract with a municipality cannot object that it was *ultra vires* the municipality, see City of Buffalo *v.* Balcom, (1892) 134 N. Y. 532; s. c., 32 N. E. Rep. 7.

[1] Hunt *v.* Fawcett et al., County Commissioners, (Wash. 1894) 36 Pac. Rep. 318. In Avery *v.* Job, (Ore. 1894) 36 Pac. Rep. 293, the Supreme Court affirmed the granting of an injunction in a taxpayer's suit, restraining the mayor, etc., of the city from purchasing a plant of a waterworks company for $28,000, worth only $10,000, and inadequate and unsuited to the purpose, though the purchase or erection of waterworks was a matter within the discretion of the city council. In Intendant & Town Council of Livingston *v.* Pippin, (1858) 31 Ala. 542, an action against the municipality to recover the price agreed to be paid for the boring of an artesian well, it was held that the municipal corporation could not set up the defense that though its corporate authorities had power to contract for the procuring of a supply of water on the public square of the town, they ought to have adopted some less expensive means of procuring it. The court said: "The corporate authorities, having the power to procure the supply of water, were themselves the judges of the *mode* and *manner* best calculated to accomplish that object. Lawless *v.* Reese, 4 Bibb, 309. The propriety of their election and the binding efficiency of their contract cannot be questioned collaterally. If their proposed expenditure was an abuse of their powers, any of the corporators have an ample remedy by injunction. See Christopher *v.* Mayor of New York, 13 Barb. 567, and authorities cited." For a full discussion of the subject of injunctions against public boards of commissioners, etc., see Stevens *v.* St. Mary's Training School, (1893) 144 Ill. 336. That persons dealing with a municipal corporation through its officers must know and are charged with a knowledge of their powers in contracting, see McDonald *v.* Mayor, etc., of New York, 68 N. Y. 23; Cornell *v.* Guilford, 1 Den. 510; Sutro *v.* Pettit, 74 Cal. 332; Hodges *v.* Buffalo, 2 Den. 110; Lowell Savings Bank *v.* Winchester, 8 Allen, 109; Merchants' Bank *v.* Bergen County, 115 U. S. 384; Wallace *v.* Mayor, etc., of San Jose, 29 Cal. 181; Dorsey County *v.* Whitehead, 47 Ark. 205; Barton *v.* Swepston, 44 Ark. 437; Schumm *v.* Seymour, 24 N. J. Eq. 143; Alton *v.* Mulledy, 21 Ill. 76; Cleveland *v.* State Bank of Ohio, 16 Ohio St. 236; Chicago *v.* Shober, etc., Co., 6 Bradw. (Ill.) 560; Craycraft v. Selvage, 10 Bush (Ky.), 708; Perkinson *v.* St. Louis, 4 Mo. App. 322;

Clark *v.* Polk County, 19 Iowa, 248; Carpenter *v.* Union, 58 Iowa, 335; Estep *v.* Keokuk County, 18 Iowa, 199; Whiteside *v.* United States, 93 U. S. 247; Harshman *v.* Bates County, 92 U. S. 569; Maupin *v.* Franklin County, 67 Mo. 327. As to when a municipal corporation is not estopped to set up a plea of *ultra vires* in actions brought upon contracts entered into by its officers, see Sioux City *v.* Weare, 59 Iowa, 95; Stidger *v.* Redoak, 64 Iowa, 465; State *v.* Haskell, 20 Iowa, 276; East Oakland *v.* Skinner, 94 U. S. 255; Post *v.* Kendall County, 105 U. S. 667; McClure *v.* Oxford Township, 94 U. S. 429; Bates County *v.* Winters, 97 U. S. 83; South Ottawa *v.* Perkins, 94 U. S. 260; Daviess County *v.* Dickinson, 117 U. S. 657; Burrill *v.* Boston, 2 Cliff. 590; Fox *v.* New Orleans, 12 La. Ann. 154; Seibrecht *v.* New Orleans, 12 La. Ann. 496; Cheeney *v.* Brookfield, 60 Mo. 53; McCaslin *v.* State, 99 Ind. 428; State *v.* Bevers, 86 N. C. 588; Dill *v.* Wareham, 7 Met. 438; Yancey *v.* Hopkins, 1 Munf. (Va.) 419; Nalle *v.* Fenwick, 4 Rand. (Va.) 585; Shipman *v.* State, 43 Wis. 381; Perry *v.* Superior City, 26 Wis. 64; State *v.* Hastings, 12 Wis. 596; Nash *v.* St. Paul, 8 Minn. 172; Donovan *v.* Mayor, etc., of New York, 33 N. Y. 291; Appleby *v.* Mayor, etc., 15 How. Pr. 428; Martin *v.* Mayor, etc., of Brooklyn, 1 Hill, 545; Albany *v.* Cunliff, 2 N. Y. 165; Overseers of Norwich *v.* Overseers of New Berlin, 18 Johns, 382; Cowen *v.* West Troy, 43 Barb. 48; Trustees of Paris Township *v.* Cherry, 8 Ohio St. 564; Western College of Medicine *v.* Cleveland, 12 Ohio St. 375; Mitchell *v.* Rockland, 41 Me. 363; Fluty *v.* School District, 49 Ark. 94; Halbut *v.* Forrest City, 34 Ark. 246; Mitchell *v.* Rockland, 45 Me. 496; People *v.* Baraga Township, 39 Mich. 554; Taft *v.* Pittsford, 28 Vt. 286; Haynes *v.* Covington, 13 Sm. & Marsh (Miss.), 408; Treadway *v.* Schnauber, 1 Dak. 236; Neely *v.* Yorkville, 10 S. C. 141; Bryan *v.* Page, 51 Tex. 532; Trustees of Belleview *v.* Hohn, 82 Ky. 1; s. c., 4 Am. & Eng. Corp. Cas. 524; Murphy v. Louisville, 9 Bush (Ky.), 189.

CHAPTER VIII.

ULTRA VIRES — PRIVATE CORPORATIONS.

§ 268. The doctrine of ultra vires as explained by English courts.— Where a corporation is created by an act of parliament for particular purposes, with special powers, "their deed, under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires* — that is, that the legislature meant that such a deed should not be made," was stated to be the rule by Baron PARKE.[1] Lord Chancellor CRANWORTH has observed in a case that he thought the statement of the rule by Baron PARKE "the more correct way of enumerating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly pro-

[1] South Yorkshire Railway *v.* Great Northern Railway, 9 Exch. 55, 84. See, also, Scottish Northeastern Railway *v.* Stewart, 3 Macq. 382, 415, by Lord WENSLEYDALE.

hibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into."[1] Lord St. Leonard has distinctly recognized that "directors cannot act in opposition to the purpose for which their company was incorporated, nor bind their companies by contracts foreign to the purposes for which they were established."[2] Lord Chancellor Cranworth has said that the English authorities had "established the proposition that a railway company cannot devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove;" and, after a review of the cases reported, "it must, therefore, be now considered as a well-settled doctrine that a company incorporated by act of parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be."[3]

§ 269. **These rules applied by English courts to special acts of corporations.**—In an English case the objects of the company registered under the English Joint-Stock Companies Act of 1862 was created were stated in its memorandum of association to be "to make and sell or lend or hire railway carriages and wagons and all kinds of railway plant fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land and buildings; to purchase and sell, as merchants, timber, coal, metals or other materials, and to buy and sell any such materials on commission or as agents." The directors agreed to purchase a concession for making a railway in a foreign country, and afterward (on account of difficulties existing by the law of that country) agreed to assign the concession to an association formed there, which was to supply the materials for the construction of the railway and receive periodical payments from the English company. In an action at law brought by the foreign associates against the English company upon this agreement, it was held in the lower courts, as well as in the House of Lords, to be *ultra vires*. The House of Lords unanimously held the contract not to be within the scope of the memorandum of

[1] Shrewsbury & Birmingham Railway *v.* Northwestern Railway, 6 H. L. Cas. 113, 135–137.

[2] Eastern Counties Railway *v.* Hawkes, 5 H. L. Cas. 331.

[3] Ibid.

association and, therefore, void and incapable of being ratified, and that the action could not be maintained.[1] In an English case it was held that no action could be maintained by one railway company against another upon an agreement made by the latter to take a lease of the railway of the first company and to pay the expenses incurred by that company in the soliciting and promoting of bills in parliament for the extension and improvement of that railway, even if the object and effect of the agreement were to increase the profits of the defendants' railway.[2] In a

[1] Ashbury Railway Carriage & Iron Co. *v.* Riche, L. R., 7 H. L. 653; in the lower courts, L. R., 9 Exch. 224. Lord SELBORNE of the House of Lords said: "The action in this case is brought upon a contract not directly or indirectly to execute any works, but to find capital for a foreign railway company in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the Ashbury Company. All your lordships and all the judges in the courts below appear to be so far agreed. But this, in my judgment, is really decisive of the whole case. * * * I think that contracts for objects and purposes foreign to or inconsistent with the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do. This being so, it necessarily follows * * * that where there could be no mandate there cannot be any ratification; and that the assent of all the shareholders can make no difference when a stranger to the corporation is suing the company in its corporate name upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation which the law says cannot and shall not be so."

[2] East Anglian Railways *v.* Eastern Counties Railway, 11 C. B. 775. It was said by Chief Justice JERVIS, in delivering the judgment of himself and Justices MAULE, WILLIAMS and TALFOURD: "This act is a public act accessible to all and supposed to be known to all, and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights whatever those rights may be. It is clear that the defendants have a limited authority only and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway. This, in truth, is the same proposition in another form, for if the company cannot carry on a trade merely because it was not contemplated by the act, they cannot embark in other undertakings not

case where a railway company, authorized by act of parliament to purchase a branch line and to raise a sum of money for the purpose of constructing that line, applied part of the sum so raised to the construction of its main line, Vice-Chancellor WIGRAM and Lord Chancellor COTTENHAM, on appeal, sustained the bill of a shareholder, not only to restrain such application of the rest of the sum, but also for an account of the part already illegally expended.[1]

§ 270. **The doctrine of ultra vires as explained by United States courts.**— The Supreme Court of the United States has approved the rules established in the English cases, and held that the purchase of a steamboat to run in connection with a railroad corporation's road and the giving of a note for the same, was a departure from the business of the corporation, and that the officers in the purchase and the execution of the note for the purchase money exceeded their authority.[2] Speak-

sanctioned by the act merely because they hope the speculation may ultimately increase the profits of the shareholders. They cannot engage in a new trade because they are a corporation only for the purpose of makand maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever may be their object or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority. Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder expecting his dividend that the money has been expended upon undertakings which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary and destined by parliament for the maintenance of the railway be expended in other undertakings not contemplated when the act was obtained and not expressly sanctioned by the legislature." See, also, Macgregor *v.* Dover & Deal Railway, 18 Q. B. 618.

[1] Bagshaw v. Eastern Union Railway, 7 Hare, 114; s. c., 2 Macn. & Gord. 389; 2 Hall & Twells, 201. In Caledonian & Dumbartonshire Railway *v.* Magistrates of Helensburgh, 2 Macq. 391, the House of Lords held that no action would lie against a railway company on an agreement of its projectors to advance money to construct a pier and harbor at the end of a proposed branch of the railway.

[2] Pearce *v.* Madison & Indianapolis Railroad, 21 How. 441.

ing of the decision in Ashbury Railway Carriage & Iron Co. *v.* Riche, 7 H. L. 653, as establishing "the broad doctrine that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action," Mr. Justice MILLER, of the Supreme Court of the United States, expressed the opinion that that decision "represents the decided preponderance of authority both in this country and in England, and is based upon sound principles."[1] This may be generally stated as settled law with reference to corporations. A corporation has power to do such business only as it is authorized to do, and no other. It is not held out by the government nor by the stockholders as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and, therefore, unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract, and a court of common law will sustain no action on the contract against the corporation.[2] The Court of Appeals of Maryland

[1] Thomas *v.* Railroad Co., 101 U. S. 71.

[2] Davis *v.* Old Colony R. R. Co., (1881) 131 Mass. 258. This reference is made to a leading English case: "In the leading case of Colman *v.* Eastern Counties Railway, 10 Beav. 1, the directors of a railway company were restrained by injunction from carrying out an agreement by which, for the purpose of increasing its traffic, they proposed to guarantee certain profits to, and to secure the capital of, a steam packet company, to ply between a port near one end of the railway in England and certain foreign ports, and Lord LANGDALE, M. R., said: 'To look upon a railway company in the light of a common partnership and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily oc-

have decided that corporations are not only incapable of making contracts which are forbidden by their charter, but in general they can make none which are not necessary, either directly or indirectly, to effect the objects of their creation, and that the corporation itself may, in an action brought against it upon such contract, deny its power to enter into it.[1] In a New York case, involving the issue of preferred stock by a corporation to certain of its stockholders who advanced money for the purposes of the corporation, FOLGER, J., of the Commission of Appeals, very fully explained this doctrine in words which have been generally approved and accepted as correct by the courts of this country. He said: "In the application of the doctrine of *ultra vires*, it is to be borne in mind that it has two phases, one where the public is concerned; one where the question is between the corporate body and the stockholders in it, or between it and its stockholders and third parties dealing with it and through it

casioned by the powers given by the several acts, those powers must always be carefully looked to, and I am clearly of opinion that the powers which are given by an act of parliament like that now in question, extend no further than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned. * * * Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made, but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by their acts; but it has not been contended that they have a right to pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of their liability is to increase the traffic upon the railway and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have frequently been done since the establishment of railways, but unless the acts so done can be proved to be in conformity with the powers given by the special acts of parliament, under which those acts are done, they furnish no authority whatever.' And after full consideration of the case he summed up his opinion thus: 'To pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation, is a thing which, according to the terms of this act of parliament they have not a right to do.' They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of parliament, and they have no power of doing anything beyond it." See, also, Salomons v. Laing, 12 Beav. 339, 352, 353.

[1] Pennsylvania, Delaware & Maryland Steam Navigation Co. v. Dandridge, 8 Gill & Johns. (Md.) 248.

with them. When the public is concerned, to restrain the corporation within the limits of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the right of the stockholder may, in many cases, be denied on the ground of his express assent or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum.* Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts. The instance put in Bissell *v.* Mich. So., etc., R. R. Co., 22 N. Y. 269, is illustrative. A bank has no authority from the state to engage in benevolent enterprises, and a subscription, though formally made, for a charitable object, would be out of its powers, but it would not be otherwise an illegal act, yet, if every stockholder did expressly assent to such an application of the corporate funds, though it would still be in one sense *ultra vires,* no wrong would be done, no public interest harmed, and no stockholder could object or claim that there was an infringement of his rights and have redress or protection. Such an act, though beyond the power given by the charter, unless expressly prohibited, if confirmed by the stockholders, could not be avoided by any of them to the harm of third persons. This arises from the principle that the trust for stockholders is not of a public nature."[1]

§ 271. Illustrations of acts not ultra vires the corporation.— In furtherance of its legitimate objects and in the due prosecution of its business, a corporation may loan money and take mortgage security.[2] If the term for which a corporation is authorized to

[1] Kent *v.* Quicksilver Mining Co., (1879) 78 N. Y. 159, 185, 186.

[2] Madison, etc., Plank Road Co. *v.* Watertown Plank Road Co., 5 Wis. 173.

loan money on mortgage be limited to one year, it may still enforce securities given for a loan of two years, if there is no penalty attached to taking such securities; and it may ratify a loan made without the required vote of its directors.[1] A building and loan association having conferred upon it by the statutes of a state expressly the power to loan money to its shareholders, on mortgages of real estate, on such terms and conditions as may be prescribed by the by-laws, a loan to one of its shareholders, though not strictly in conformity to one of its by-laws, or even contravening it, would not be *ultra vires*.[2] Corporations formed under the general law of California, it has been held, have the power to purchase and hold an exclusive franchise or privilege granted by the legislature to an individual and his assigns.[3] It does not fol-

[1] Germantown F. M. Ins. Co. *v.* Dhein, 43 Wis. 420.

[2] Kelly *v.* Mobile Building & Loan Association, (1879) 64 Ala. 501. In Cooper *v.* Frederick, (1846) 9 Ala. 738, it was held that a resolution by the directors of a railroad corporation, that the stockholders might relinquish one-half of their stock and the payments previously made accounted for as if made on the stock retained, provided the stockholders paid all the calls subsequently made by the directory, was in the nature of a contract, entered into between the corporation and its members, and was not on its face illegal and improper.

[3] California State Telegraph Co. *v.* Alta Telegraph Co., (1863), 22 Cal. 398. A purchase by a corporation in the face of a positive prohibition would be void; but that is not this case. There was no provision of law forbidding the purchase; and, admitting that the corporation had no power to make it, the want of power, in the absence of an express prohibition, is not sufficient to avoid it as to third persons. The rule in such cases was laid down by this court in Natoma Water & Mining Co. *v.* Clarkin, 14 Cal. 544. In that case the corporation was empowered to purchase such property as the purposes of the corporation should require, and it was objected that the property in controversy was not of that description, and that the corporation had no power to purchase it. The court overruled the objection, saying: "Whether or not the premises in controversy are necessary for those purposes, it is not material to inquire; that is a matter between the government and the corporation, and is no concern of the defendant." The reason of the rule is obvious. As between the parties the purchase is valid and it must be so as to third persons, until, by a proper proceeding, a forfeiture has been declared. It is well settled that a cause of forfeiture cannot be inquired into collaterally." In his concurring opinion Cope, Ch. J., said: "As to the capacity of the corporation to purchase, the defendant is not the party to object. If the corporation, in making the purchase, has acquired property which, under the law of its incorporation, it had no right to acquire, all that can be said is that it has exceeded its powers, and may be deprived of the property by a judgment of forfeiture. The question is one which the state alone can raise."

low from the prohibition in a charter of a corporation of dealing in commercial paper that the corporation may not receive and sell notes given for the sale of its lands.[1] A corporation succeeding to the business of an individual in its line of manufactures, for instance, may accept from the individual whom it succeeded an order accepted by him upon particular terms.[2] Though the articles of an incorporated college may not expressly give it power to raise and control funds by taking endowment notes, it may accept and enforce payment of such notes.[3] A contract entered into by a railroad corporation before the completion of its line of road, for the transportation of freight after the completion of its line, is not *ultra vires*, but is binding and enforceable.[4] And such a corporation, while retaining the benefit of such a contract which has been fully executed, cannot assert that it had no power to make the contract the consideration for which it had received.[5] A railroad corporation, under the statutes of Indiana, may pay in advance for the use of another railroad thus aiding in its construction.[6] It is not beyond the power of a corporation authorized by its charter to purchase "any real estate or other property," etc., to purchase its own stock.[7] In an early Massachusetts case it was held that where a statute of the state prohibited the receiving or negotiating in any way of bills or notes of banks not incorporated in that state, the taking of a note payable in such bills was an act *ultra vires* a Massachusetts banking institution and the

[1] Buckley *v.* Briggs, (1860) 30 Mo. 452. In Western Organ Co. *v.* Reddish, 51 Iowa, 55, it was held that the corporation, though organized for the manufacture and sale of musical instruments, with no power to engage in the business of loaning money, might still take from its agent in payment of indebtedness by him to the corporation the note of a third party belonging to him.

[2] Cook Manufacturing Co. *v.* Randall, 62 Iowa 244.

[3] Simpson Centenary College *v.* Bryan, 50 Iowa, 293.

[4] Louisville, New Albany & Chicago Ry. Co. *v.* Flanagan, (1887) 113 Ind. 498.

[5] Ibid.

[6] Aurora & Cincinnati R. Co. *v.* City of Lawrenceburgh, (1877) 56 Ind. 80. As to the right of a corporation to purchase its own stock and reissue it, see City Bank *v.* Bruce, 17 N. Y. 507; C., P. & S. W. R. R. Co. *v.* Marseilles, 84 Ill. 145, 643; L. S. I. Co. *v.* Drexel, 90 N. Y. 93; State Bank *v.* Fox, 3 Blatchf. 434; Otter *v.* Brevoort P. Co., 50 Barb. 256. As to the power of a corporation to purchase shares of its own stock in good faith, and not in fraud of its creditors, see Chicago, Pekin & So. Western R. R. Co. *v.* President, etc., Town of Marseilles, (1876) 84 Ill. 145; on rehearing, 84 Ill. 643; Clapp *v.* Peterson, (1882), 104 Ill. 26.

[7] Iowa Lumber Co. *v.* Foster, 49 Iowa, 25.

note was void.[1] A manufacturing corporation may take shares of another corporation in payment of a debt.[2] An academy being incorporated for the purpose of holding funds to be applied to the eaucation and moral and religious improvement of youth, its trustees are capable of holding funds in trust for an association the objects of which are similar and to any extent auxiliary to those for which they may have been incorporated.[3] A corporation vested with power to take and dispose of the securities of another corporation may guarantee the payment of those securities if it disposes of them to another party in payment of its own debt. So, too, if it buys property subject to a mortgage security bond, it may guarantee the payment of such bonds if the guaranty be taken as payment *pro tanto* of its debt.[4] A corporation created for the purpose of constructing a road, empowered by statute to borrow money to be used in the construction of its road or in paying for materials purchased for its construction and to mortgage its road to secure the payment of the money so borrowed, may mortgage its road to secure the payment of money due a contractor for constructing the same; and it may mortgage any portion of its road as well as the whole of it.[5] Such a corporation, the charter of which authorizes it to borrow money "on such terms as might be agreed upon between the parties," may borrow money at a rate of interest beyond that established by the general law.[6] An insurance corporation authorized to invest its capital, profits and surplus funds in such securities, and in such manner as it may elect, and required to invest its reinsurance fund among other securities, in "bonds and mortgages on unin-

[1] President, Directors, etc., of Springfield Bank *v.* Merrick, (1817) 14 Mass. 322.

[2] Howe *v.* Boston Carpet Co., (1860) 16 Gray, 493; citing Hodges *v.* New England Screw Co., 1 R. I. 312, and 3 R. I. 9; Treadwell *v.* Salisbury Mfg. Co., 7 Gray, 393.

[3] Phillips Academy *v.* King (1815), 12 Mass. 546.

[4] Ellerman *v.* Chicago Junction Railway & Union Stock Yards Company, (1891), 49 N. J. Eq. 217. In Willoughby *v.* Chicago Junction Railways & Union Stock Yards Company, (1892) 50 N. J. Eq. 656, the defendant corporation being authorized by charter to issue bonds for proper corporate purposes, and the validity of the contract being established, the Court of Chancery declined to interfere to regulate the character of the payments, or of the instruments to be issued therefor, as long as the same were not expressly unauthorized.

[5] Greensburgh, Milford & Hope Turnpike Co. *v.* McCormick, (1873) 45 Ind. 239.

[6] Morrison *v.* Eaton & Hamilton R. R. Co. (1860) 14 Ind. 110.

cumbered real estate," will not commit an act *ultra vires* by making a loan of money to one, accepting his notes and mortgage to secure them.[1] The charter of a Massachusetts corporation authorized it to purchase and hold "in fee simple or otherwise" real and personal estate to the amount of $50,000, which was increased by subsequent statutes to $600,000. The corporation was also by its charter authorized to appropriate its funds to charitable purposes, and to employ its annual income, among other purposes, "to promote inventions and improvements in the mechanic arts, by granting premiums for said inventions and improvements." There was no direction in the charter or subsequent statutes as to the manner in which the provisions for granting these premiums should be carried out. It was held by the Supreme Court of Judicature that the corporation might purchase land and erect a permanent building thereon in which to hold exhibitions and the meetings of the corporation.[2]

[18] Daly *v.* National Life Insurance Co., (1878) 64 Ind. 1.

[19] Richardson *v.* Massachusetts Charitable Mechanic Association, (1881) 131 Mass. 174. It was said by the court: "For many years the association has been in the habit of holding such exhibitions in buildings hired or temporarily erected for that purpose. The money received from such exhibitions, over and above the expenses, has been invested in real and personal estate, and the income therefrom devoted to the use of the association as directed by the charter. We cannot say that the method thus adopted for carrying into execution this particular provision of the charter is beyond the power of the corporation. The charter failing to indicate in what manner this power shall be exercised, a wide discretion is given to the association; for there are many ways in which it might be executed. An exhibition open to the public at a proper charge, at which mechanics may display their inventions and improvements, and compete for premiums and gratuities, would seem to be a reasonable method for carrying out this provision, not inconsistent with any other provision of the charter; and any profit arising therefrom might properly be held by the association and the income thereof devoted to the purposes for which it was incorporated. In order to do this, a place must be provided for the exhibition, either by hiring buildings, or by erecting temporary or permanent buildings for the purpose, for the association has full power to acquire title to real estate in fee simple or otherwise, and it can undoubtedly hold such real estate as is necessary for its use in the exercise of the powers conferred upon it." In Seymour *v.* Spring Forest Cemetery Association, (1892) 64 Hun, 632; s. c., 19 N. Y. Supp. 94, the bonds given by the association for lands purchased under the powers granted such associations by statute to "purchase such real estate as the purposes of the association may require" were held not to be void as *ultra vires*. See Fuld *v.* Burr Brewing Co., (Ct. Com. Pl. N. Y. City, 1892) 18 N. Y. Supp. 456, for an illustration of what guaranty was

Where a railroad corporation agreed to load steamers chartered by a cotton compress company with cotton on terms named in their contract for shipment, and the compress company had, by the delay of the railroad corporation in delivering the cotton for shipment, to pay a large sum for demurrage and brought its action against the railroad corporation for its recovery, the Court of Appeals of Virginia held that the contract on the part of the railroad corporation was not *ultra vires*.[1] A loan of money upon mortgage security by a corporation organized for the purpose of constructing ditches for the conveyance and sale of water, the California Supreme Court has held, was not necessarily an act exceeding its corporate powers; further, such a contract, if necessary to attain its general objects and made as an incident to the exercise of its granted powers, was valid, and in the absence of proof it would be presumed.[2] A corporation, organized under

not *ultra vires* this corporation, and, if so, the plea of *ultra vires* was not available, in which case Schurr *v.* Investment Co., (Ct. Com. Pl. N. Y. City, 1892) 18 N. Y. Supp. 454, was distinguished. Illustration of a contract not *ultra vires* the corporation, see United Lines Telegraph Co. *v.* Safe Deposit & Trust Co., (1893) 147 U. S. 431; s. c., 13 Sup. Ct. Rep. 396. What class of contract by a railroad corporation is not *ultra vires*, see Union Pacific Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., (1892) 51 Fed. Rep. 309; s. c., 2 C. C. A. 174; 10 U. S. App. 98.

[1] Norfolk & Western R. R. Co. *v.* Shippers' Compress Co., (1887) 83 Va. 272; s. c., 2 S. E. Rep. 139. The court said: "The contract was incident to and for the benefit of their business as common carriers, and it was but a part of a long-established and systematic policy of these railroads composing the air lines to induce and control the transportation of cotton for the interior west and southwest over their line for shipment to England from the port of New York. It was not a contract to buy or sell cotton, but simply to deliver a certain number of bales of cotton, at a specified time, at Norfolk, for shipment to Liverpool by chartered steamers for that purpose. It was not contrary to or forbidden by their charter, and it was for the interests of commerce and in the line of their business." Citing additionally, as authority, 1 Wood Ry. Law, § 170, pp. 474, 479, 480, 523; §§ 179, 182; Pierce on Railroads, 499–501, 508–510.

[2] Union Water Co. *v.* Murphy's Flat Fluming Co., (1863) 22 Cal. 621. "For instance," said the court, "it might be necessary for such a corporation to make advances, in the nature of a loan, to enable a contractor to construct their works, or it might be very necessary for such a corporation to procure an additional supply of water, and a loan of money to another water company who may be engaged in constructing ditches which will bring such additional supply, may be the direct and necessary means to attain that object. So, too, it might become necessary for a corporation engaged in a large enterprise, such as the construction of large canals, railroads, turnpike roads, and the like, to borrow

the laws of Illinois, through its stockholders and officers entered into an agreement with other persons owning patents, etc., adapted to its business, by which a new corporation was organized, the former as a part of its agreement transferring to the new one 10,000 of its shares of stock, which had been prop-

money on favorable terms and at a low rate of interest; it might be necessary to borrow it upon long time, providing a sinking fund for its payment, by setting apart a certain portion of the corporate revenues, to be loaned out on interest, suffering the principal and interest to accumulate to an amount sufficient to repay the borrowed money when due. Such is the usual mode of conducting the business of corporations of that character, and there can be no objection to it so long as the legitimate business of the corporation is not changed into that of a loan company. So long as the loans are a mere incident to the exercise of its legitimate powers they are rightful and valid. So numerous other cases of a like character might be suggested where loans by a corporation might be very proper and necessary in conducting its business operations; and if all corporations are to be considered as absolutely prohibited, or not permitted, to make any loan of money except in the few classes of cases of corporations where it is expressly allowed by the statute, and all such contracts are to be held void, a result would be produced which certainly never was intended by the legislature, nor is it sustained by the rules of law. A corporation had power to insure lives and grant annuities, and it was held that, as it must have funds to apply to those purposes, it might loan its money, and the loan by it would be presumed to have been made in the ordinary course of its business, and, therefore, valid, although it had no express power to loan money. The authority to loan money was upheld as an incident to the other powers conferred by the charter. Farmers' L. & T. Co. *v.* Clowes, 4 Edw. Ch. 575; s. c., 3 Comst. 470; Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. 339. So, too, an insurance company was incorporated without any special provision in relation to the mode of investing its capital, and it was held that it had the power to invest the whole or any part of its capital by way of loans on bond and mortgage and to reinvest it in the same way whenever it should become necessary or convenient to do so. Mann *v.* Eckford, 15 Wend. 512. Where a bank was authorized to take mortgages in security for debts previously contracted, it was held that if the loan and mortgage were concurrent acts it was not a violation of the restraining clause of the statute. Silver Lake Bank *v.* North, 4 Johns. Ch. 370; Baird *v.* Bank of Washington, 11 Serg. & R. 411. A plankroad company was not authorized to loan money, but if necessary it can legally loan a sum of money to one of its contractors to enable him to build a portion of its road. Madison, etc., Plank Road Co. *v.* Watertown Plank Road Co., 5 Wis. 173. A corporation was prohibited from dealing in goods, wares and merchandise. Held, that a loan made, secured by a quantity of cotton, which was to be shipped and sold and the proceeds credited to the debtor on the loan, was not a violation of the charter. Bates *v.* State Bank, 2 Ala. 465. So, too, a sale by a bank of a quantity of butter which it had taken in settlement of a debt was deemed no violation of a similar clause in its charter. Sacketts Harbor

erly set apart for sale for making capital, to be used by the new corporation in the same manner. In an action against one who had purchased 500 shares of this stock, upon his notes given for the same, his plea was that it was an overissue of the stock of the corporation. This point was ruled against the defendant by the Appellate Court of Missouri, and at the same time the court considered the question whether such an agreement, when ratified by the stockholders of the old company and carried out by delivery of the stock to the new company, was repugnant to the laws of the state of Illinois. The court said: "Our examination of the Illinois decisions has led us to the opinion that this contract or arrangement was not *ultra vires* under the law of that state. There are numerous cases of the Supreme Court of that state which hold that a corporation may purchase its own stock and violate no duty to its own stockholders. Chetlain *v.* Ins. Co., 86 Ill. 220; Chicago, etc., Railroad Co. *v.* President, 84 Ill. 145. In the Chetlain case the court held that if A subscribed for ten shares of the capital stock of a corporation, and, having paid two hundred dollars, was willing to receive a certificate for two shares of one hundred dollars each and cancel his subscription for the ten shares, this could be done, and that the other eight shares would belong to the company, and that it had a right to sell them to whom it pleased. The doctrine of this case would indicate that the agreement to donate the ten thousand shares was invalid, and when ratified by the stockholders of the old company it vested in the new corporation the title to the stock and the company had the right to sell it to whom they pleased. * * * There is no principle of law known to us which would release the defendant from his liability to pay these notes. No question of fraud or misrepresentation is urged; in fact, the record shows that the plan of incorporation, and especially the plan adopted for the sale of the stock, was devised by the defendant himself. He was an officer and director of the corporation and took an active part in the management of its business, and he is, therefore, in no position to claim that he was overreached or in any way deceived

Bank *v.* Lewis County Bank, 11 Barb. 213. A glass company, not authorized to sell goods generally, sold goods to one in their service, and it was held that the legislature did not intend to prohibit a supply of goods to those employed in the manufactory, and that the corporation might recover for them. Chester Glass Co. *v.* Dewey, 16 Mass. 102."

in the purchase of the stock or in the execution of the notes."[1] In a Kansas case the Supreme Court held that a contract entered into by a town company incorporated "for the purchase of land, the surveying and platting of town sites and selling town lots and other lands," in which it was agreed that if a certain party would remove a bank, a barn and a restaurant located elsewhere to the town site, the town company would convey to him certain lots in the town and pay him the sum of $1,000, tended directly to enhance the value of the remaining property of the corporation, and was not necessarily *ultra vires.*[2] A contractor for construction of a railroad in Wisconsin was stopped from his work with

[1] Eggmann *v.* Blanke, (1890) 40 Mo. App. 318.

[2] Sherman Center Town Company *v.* Russell, (1891) 46 Kans. 382; s. c., 26 Pac. Rep. 715. *Arguendo,* the court said, upon the insistment that the contract was *ultra vires:* "The corporation may exercise not only the powers expressly enumerated in its charter, if they are authorized by law, but 'may enter into any obligation or contract essential to the exercise of the powers expressly enumerated.' Gen. Stat. of 1889, ¶ 1167. The company is not restricted to the mere purchase and sale of lots, but may doubtless enter into contracts which would directly tend to promote the prosperity of the town, and enhance the value of the lots remaining unsold. To this end it may expend money for the advertising of the property, the making of improvements on a part of the same, may contract for the erection of school buildings and other improvements, the direct and proximate tendency of which will be to attract people to the town and make the property of the company more desirable and salable. The location of [this party] with his bank, his barn and restaurant at the town of Sherman Center no doubt tended directly and proximately to build up the town and give it prestige in that community, thus enhancing the value of the remaining lots and promoting the legitimate objects of the corporation. In Whetstone *v.* Ottawa University, 13 Kans. 320, the question arose whether the Ottawa Town Company could donate the property of the corporation to the Ottawa University for the purpose of erecting a school building outside of the limits of the town of Ottawa, and more than one-fourth of a mile outside of the limits of the property and the land owned by the town company. Mr. Justice BREWER, who pronounced the judgment of the court, remarked that 'Town-site companies are neither novel nor rare in Kansas. Every county has been the home of several, and the manner of their working, and the means employed to accomplish their purposes, are familiar to us all. Nor is Kansas peculiar in this respect. Every western state is full of them. They are private corporations, organized for the purposes of gain. They take real estate, lay it off in lots and blocks, streets and alleys, induce people to settle and purchase, and by the sale of lots make their profits. * * * If by the donation of one lot they can double the value of the remainder, is not the one lot used directly to accomplish the legitimate object of the corporation? If by donating one hundred lots to the county they can secure

the company largely in debt to him. He brought action and obtained judgment. Execution had been returned *nulla bona.* This company had had a benefit of a grant of land. Another company had, through its sole ownership of the stock and by improper practices, managed to have the whole of the property of the indebted company transferred to itself. The United States Supreme Court upheld the suit of representatives of the judgment creditors against this other company to enforce the payment against the transferred property, holding that a sole stockholder in a corporation could not secure the transfer to itself of all the property of the corporation so as to deprive a creditor of the corporation of the payment of his debt.[1] It appeared in a Massachusetts case that a mutual benefit order deposited money with a trust company, which trust company became thereafter unable to repay it. The benefit order assigned the fund to another in terms to secure a promissory note given for a loan, the money obtained by the loan being disbursed in the usual course of its business. The Supreme Judicial Court of that state held that, as the effect of the assignment of the fund was to secure the debt, it was not *ultra vires* even if conceded that the benefit order could not legally make a promissory note. Further, the loan, to secure which the assignment of the fund was given, having been authorized at a meeting of the order and the money obtained used for its benefit, equity would not, at the instance of the receiver of the insolvent trust company, the depositary of the fund, forbid its payment to the assignee out of money in his hands on the ground that the officers executing the assignment had no authority to do so.[2]

the county seat and the erection of county buildings, are they not furthering the very purpose of building up a town? * * * The purpose of securing improvements on the town site is not simply that the improvements be there, but that thereby the property the corporation has to sell may be enhanced in value. And if the lots were donated to secure the erection of a hospital or school at a remote place, as suggested by counsel, there would be no resultant benefit to the corporation of enhanced value of its unsold lots. It seems to us that this must be the test: If the direct and proximate tendency of the improvements sought to be obtained by the donation is the building up of the town and the enhanced value of the remaining property of the corporation, the donation is not *ultra vires*.' "

[1] Angle *v.* Chicago, St. Paul, Minneapolis & Omaha Ry. Co., (1894) 151 U. S. 1.

[2] Commonwealth *v.* Suffolk Trust Co., (Mass. 1894) 37 N. E. Rep. 757.

§ 272. Illustrations of acts ultra vires the corporation.— A corporation confined by its charter to one business cannot lawfully engage in enterprises foreign to that business. For instance, a railroad corporation, the purposes of which are strictly confined to the completion and maintaining of a railroad, cannot lawfully engage in banking.[1] Neither can a corporation engaged in insuring property.[2] While a railroad corporation may adopt any convenient means, proper in themselves, tending directly to the execution of the powers conferred upon it by its charter, and not amounting to the transaction of any distinct unauthorized business,[3] it cannot engage in such business as banking, manufacturing, speculating in land, or the like, as a means of raising funds to build or operate its road.[4] A provision in the charter of an insurance corporation authorizing it to receive money on deposit, "and to give acknowledgments for deposits in such manner and form as they may deem convenient and necessary to transact such business," has been held not to authorize the corporation to issue certificates of deposit to circulate as money, and with the intent that they shall so circulate.[5] A railroad corporation, chartered for the specific purpose of constructing a railroad from one point within the state to the state line, and then to connect with a railroad corporation of that other state, with no express power to execute bills and notes, is limited to executing such bills or notes to such as may be necessary or proper in carrying through that undertaking. It cannot execute accommodation paper, or paper to aid any undertaking not contemplated by its charter; and such

[1] People *v.* River Raisin & Lake Erie R. R. Co., (1864) 12 Mich. 389.

[2] Blair *v.* Perpetual Insurance Co., (1847) 10 Mo. 559.

[3] Clark *v.* Farrington, 11 Wis. 306.

[4] Waldo *v.* Chicago, St. Paul & Fond du Lac R. R. Co., 14 Wis. 575.

[5] Bliss *v.* Anderson, (1858) 31 Ala. 612. The court said: "The corporation may issue its certificates of deposit in any manner and form which will accomplish its business of a depository, but not in such manner and form as will accomplish that and another business. If it can so fashion its certificates of deposit as to procure for them a circulation as money, it can add to its granted powers by an ingenious device, and obtain by subterfuge an authority which legislative caution withheld from it." In Philadelphia Loan Co. *v.* Towner, (1839) 13 Conn. 249, a provision of the charter of the corporation that "nothing therein contained should be construed to authorize the company to discount notes or exercise any banking privileges," was held to prohibit the taking of a note for the sum loaned, and the securing of the interest on that sum in advance, for the period of the loan, and that there could be no recovery on a note thus discounted.

paper, if executed, would be void in the hands of an assignee.[1] Neither a railroad corporation organized under the laws of, or chartered in Massachusetts, nor a corporation organized under the statutes of that state for the manufacture and sale of musical instruments, has power to guarantee the payment of expenses of a musical festival; and no action can be maintained upon such a contract of guaranty, though it may be made with the reasonable belief that the holding of such a festival would be of great benefit to the corporations by increasing their proper business.[2] Though corporations created for the purpose of carrying on a manufacturing business have implied power to make negotiable paper for use within the scope of their business, they have no power to become parties to bills or notes for the accommodation of others.[3] It is not within the powers of a manufacturing corporation, limited by its charter in the use of mercantile paper to that necessary for the convenient prosecution of its business, to accept paper drawn by third parties for accommodation.[4] A contract by which a railroad corporation undertook to grant the exclusive right to construct and maintain a telegraph line along its road to a single telegraph company, has been held in the United States Circuit Court for the district of Washington to be *ultra vires* and void.[5]

[1] Smead *v.* Indianapolis, Pittsburgh & Cleveland R. R. Co., (1858) 11 Ind. 104. In Abbott *v.* Baltimore & Rappahannock Steam Packet Co., (1850) 1 Md. Ch. 542, the object of the corporation, as stated in its charter, was "for the purpose of establishing and conducting a line of steamboats and stages or carriages between Baltimore and Fredericksburg, and the several ports and places on the Rappahannock, and on the rivers and waters of the Chesapeake bay, for the conveyance of passengers and transportation of merchandise and other articles." The High Court of Chancery of Maryland held that it was beyond the power of this corporation to enter into an obligation to aid in an improvement, the purpose of which was to open the Rappahannock river, and render it navigable to the basin in or near Fredericksburg.

[2] Davis *v.* Old Colony R. R. Co., (1881) 131 Mass. 258; Davis *v.* American Organ Co., (1881) 131 Mass. 258.

[3] National Bank of Republic of New York *v.* Young, Receiver of Joseph Dixon Crucible Co., (1886) 41 N. J. Eq. 531; s. c., 7 Atl. Rep. 488; citing 1 Dan. Neg. Inst. §§ 382, 386; Green's Brice's Ultra Vires, 255, 272.

[4] Webster *v.* Howe Machine Co., (1886) 54 Conn. 394; s. c., 8 Atl. Rep. 482.

[5] Pacific Postal Telegraph Cable Co. *v.* Western Union Telegraph Co., (1892) 50 Fed. Rep. 493. HANFORD, D. J., gave as a reason for this ruling "that the laws of the territory of Washington in force when [the contract] was made, did not authorize a railway corporation to transfer land acquired for railroad purposes by lease, so as to divest itself of its duties and obligations to the public as to the

The New York Court of Appeals has held that while a corporation organized under the Manufacturing Act of that state has the general power to bind itself by promissory notes and contracts of indorsement made in the usual course of business, it has no power to indorse notes for the accommodation of the maker for a consideration paid.[1] The court, in its opinion, said: "It is well settled that such a power is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing and like business corporations."[2] A contract by which a street

use of such. By the plaintiff's own showing it appears that [the railway company] was incorporated to do a general transportation business by rail, and to be a competitor for interstate and international commerce. Its franchise from the state, therefore, made it to a certain extent a public agent endowed with part of the sovereign power of the commonwealth, and a railroad constructed in this state by a corporation organized under the laws of the state or its predecessor, the territory, must necessarily be a highway for public use, in and to which the public have rights limited and regulated by law. There is no statute authorizing such a transfer of property in the right of way and control thereof as the plaintiff now claims was made to it by such contract, and, without express authority conferred by a statute, no transfer of such property or of the right to control the same, could be made whereby the rights of the public, or a third party, *e. g.*, the Western Union Telegraph Company, could be in any manner abridged." Citing Lakin *v.* Willamette Valley, etc., R. R. Co., 13 Or. 436; s. c., 11 Pac. Rep. 68; Braslin *v.* Somerville Horse R. R. Co., 145 Mass. 64; s. c., 13 N. E. Rep. 65; Palmer *v.* Railway Co., (Idaho) 16 Pac. Rep. 553; Railroad Co. *v.* Brown, 17 Wall. 445; Railroad Co. *v.* Crane, 113 U. S. 433, 434; s. c., 5 Sup. Ct. Rep. 578; Oregon Railroad & Navigation Co. *v.* Oregonian Co., 130 U. S. 1; s. c., 9 Sup. Ct. Rep. 409; Van Dresser *v.* Navigation Co., 48 Fed. Rep. 202; U. S. *v.* Western Union Tel. Co., 50 Fed. Rep. 28. That contracts beyond the power of a corporation to make cannot be made binding by a ratification, see Brady *v.* Mayor, etc., of New York, (1859) 20 N. Y. 312. Case holding a contract of sale of the property of a corporation to a foreign corporation, organized through its procurement, for the purpose of taking its place and its assets and carrying on its business *ultra vires:* People *v.* Ballard, (1892) 134 N. Y. 269; s. c., 32 N. E. Rep. 54, reversing People *v.* Ballard, 56 Hun, 125.

[1] National Park Bank of New York *v.* German-American Mutual Warehousing & Security Co., (1889) 116 N. Y. 281, reversing Same *v.* Same, 21 J. & S. 367.

[2] Citing Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. 421; Farmers & Mechanics' Bank *v.* Empire Stone Dressing Co., 5 Bosw. 275; Morford *v.* Farmers' Bank of Saratoga, 26 Barb. 568; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; Ætna National Bank *v.* Charter Oak Life Ins. Co., 50 Conn. 167; Monument National Bank *v.* Globe Works, 101 Mass. 57; Davis *v.* Old Colony R. R. Co., 131 Mass. 258;

railway corporation transferred the entire control of its road with all its franchises, receiving in return only a fixed rent paid in the form of a dividend to its stockholders, has been held to be *ultra vires* and void.[1] A firm of commission merchants and members of the Cotton Exchange of New York received from the cashier of a Texas savings bank and trust corporation, orders to purchase cotton — dealing in futures as it is known — on account of customers of the bank. They made such purchases, and there being a loss in the end, brought their action against the Texas corporation for the amount. The New York Court of Appeals held the transaction to be *ultra vires* the corporation.[2] There

Culver *v.* Reno Real Estate Co., 91 Pa. St. 367; Hall *v.* Auburn Turnpike Co., 27 Cal. 255. As to a manufacturing corporation discounting a note, see Lawrenceville Cement Co. *v.* Parker, (1890) 10 N. Y. Supp. 831.

[1] Middlesex R. R. Co. *v.* Boston & Chelsea R. R. Co., (1874) 115 Mass. 347; citing Richardson *v.* Sibley, 11 Allen, 65.

[2] Jemison *v.* Citizens' Savings Bank of Jefferson, Texas, (1890) 122 N. Y. 135. In the opinion it was said: "Corporations are artificial creations existing by virtue of some statute and organized for the purposes defined in their charters. A person dealing with a corporation is chargeable with notice of its powers and the purposes for which it is formed, and when dealing with its agents or officers is bound to know the extent of their power and authority. A corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It follows that the plaintiffs must have known or are chargeable with knowledge of the corporate powers of the defendant and of the extent to which its cashier could bind the corporation. Alexander *v.* Cauldwell, 83 N. Y. 480; Hoyt *v.* Thompson, 19 N. Y. 207–222; Relfe *v.* Rundle, 103 U. S. 222–226; Davis *v.* Old Colony R. R. Co., 131 Mass. 258–260; Leonard *v.* A. Ins. Co., 97 Ind. 299. Savings banks are designed to encourage economy and frugality among persons of small means and are organized with restrictions and provisions intended to secure depositors against loss. Speculative contracts entered into for the sale or purchase of stock by a savings bank at the stock board or elsewhere, subject to the hazard and contingency of gain or loss, are *ultra vires*, and a perversion of the powers conferred by its charter. People, etc., *v.* M. & T. S. Inst., 92 N. Y. 7–9; Sistare *v.* Best, 88 N. Y. 527–531. Contracts of corporations are *ultra vires* when they involve adventures or undertakings outside and not within the scope or power given by their charters. The acts under which they are organized were framed in view of the rights of the public and the interest of the stockholders. As artificial creations they possess only the powers with which they were endowed. An act may be *malum in se* or *malum prohibitum*, or an act may not be immoral or prohibited by any statute, and still it may be in excess of the powers vested in the officers of a corporation, unauthorized and prejudicial to the stockholders. In either case the plea of *ultra vires* should prevail unless it would defeat justice or accomplish a legal wrong." The court then applied the

was a contention in this case that the contract had been executed on the part of the plaintiffs, and that the corporation was estopped from setting up the defense of *ultra vires.* The Court of Appeals held, however, that, under the circumstances of this case, the defense was still available to the corporation.[1]

principles to the case at bar: "As we have seen, the defendant was chartered for the purpose of receiving on deposit or in trust such sums of money as may from time to time be offered by tradesmen, merchants, clerks, laborers, servants and others. It was authorized to loan these moneys according to the Constitution and laws of the state and to discount in accordance with bank usages, taking such security therefor, either real or personal, as the directors may deem sufficient. In addition thereto the defendant was given power to borrow money, buy and sell exchange, bullion, bank notes, government stocks and other securities. The authority here given to buy and sell exchange, bullion, bank notes, government stocks and other securities does not embrace or include speculative contracts in cotton futures any more than it does hay, oats, provisions or dry goods. The exchange, bullion, bank notes, securities, etc., authorized are those of fixed value, current in the market and not subject to the control of speculators. Whilst the buying and selling of cotton to be delivered in the future may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter and the Constitution and laws of the state, and in so far as this right was violated by the transaction in question it was a misappropriation of the funds and immoral."

[1] Jemison *v.* Citizens' Savings Bank of Jefferson, Texas, (1890) 122 N. Y. 135. The court reviewed leading cases pertinent to this question, saying: "In the case of Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, the plaintiff was a corporation organized for the purpose of manufacturing every variety of firearms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver ten thousand locks. The locks having been delivered, it was held that the contract was fully executed, and the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price." Citing Huntington *v.* Savings Bank, 96 U. S. 388; Thomas *v.* R. R. Co., 101 U. S. 71; Nassau Bank *v.* Jones, 95 N. Y. 115; Leslie *v.* Lorillard, 110 N. Y. 519. The court said further: "We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in Parish *v.* Wheeler, 22 N. Y. 494, in which it was held that a railroad company having purchased and received a steamboat, could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral. Nassau Bank *v.* Jones, *supra;* P. C. & S. L. R. Co. *v.* K. & H. B. Co., 131 U. S. 371-389. In the case at

In an Iowa case it was held that it was *ultra vires* a corporation organized under articles of incorporation which defined its business to be "the general freight and transfer business, and such other business as may not be inconsistent therewith," to become surety on a bond given to another corporation.[1] The court also held that the contract of suretyship being utterly void there was no estoppel of the corporation to plead *ultra vires* as to the undertaking.[2]

bar, the transaction, as we have seen, was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York, in which the members doing business therein, with other members, act as principals and are liable as such. The most that can be claimed is that they held the cotton, or the contracts therefor, subject to the call or order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property to the defendant. If the steamboat had never been delivered to the railroad company so as to transfer the title thereto, or if the ten thousand locks had never been delivered to the American Seal Lock Company, very different questions would have been presented in the cases to which we have called attention. We, consequently, are of the opinion that under the circumstances of this case, the defense of *ultra vires* is still available to the defendant."

[1] Lucas *v.* White Line Transfer Co., (1886) 70 Iowa, 541; s. c., 30 N. W. Rep. 771. The court, through ROTHROCK, J., said: "The simple act of giving security for another is out of the line of the prosecution of any business. It is a mere accommodation, and it cannot be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture," and quotes as follows: "It is no part of the ordinary business of commercial corporations, and *a fortiori* still less, of non-commercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires*, whether in the indirect form of going on accommodation bills or otherwise becoming liable for the debts of others. Green's Brice Ultra Vires, 252; Madison, etc., Plank Road Co. *v.* Waterman, etc., Plank Road Co., 5 Wis. 59."

[2] Lucas *v.* White Line Transfer Co., (1886) 70 Iowa, 541; s. c., 30 N. W. Rep. 771. This holding was reached by the application of the following rules, as stated by ROTHROCK, J., to the case: "(1) Every person dealing with a corporation is charged with knowledge of its powers, as set out in its recorded articles of incorporation. (2) Where a corporation exercises powers not given by its charter, it violates the law of its organization, and may be proceeded against by the state, through its attorney-general, as provided by the statute, and the unanimous consent of all the stockholders cannot make illegal acts valid. The state has the right to interfere in such case. (3) Where a third party makes

§ 273. **Leasing corporation's property and franchises for a term of years.**— The Indiana Supreme Court has held that a lease of its road by a railway corporation of that state for a long term of years, with the privilege of renewal of the same, to another corporation of the same kind in consideration of the latter

with the officers of a corporation an illegal contract beyond the powers of the corporation, as shown by its charter, such third party cannot recover, because he acts with knowledge that the officers have exceeded their power, and between him and another corporation, or its stockholders, no amount of ratification by those authorized to make the contract will make it valid. (4) Where the officers of a corporation make a contract with third parties in regard to matters apparently within their corporate powers, but which, upon the proof of extrinsic facts (of which such parties had no notice), lie beyond their powers, the corporation must be held, unless it may avoid liability by taking timely steps to prevent loss or damage to such third party; for in such cases the third party is innocent, and the corporation stockholders less innocent, for having selected officers not worthy of the trust reposed in them. (5) This class of cases may be illustrated by that where the officers of a corporation empowered to build and operate a certain line of railroad, purchased iron to be used for another line without the knowledge of the vendee. So, in case of Humphrey v. Patron's Mercantile Assn., 50 Iowa, 607, the debts of the corporation were, by its articles, limited to a certain amount; but the officers of the association, in dealing with Humphrey, exceeded that amount without his knowledge or means of knowledge, and the corporation was held. Thompson *v.* Lambert, 44 Iowa, 239, belongs to the same class of cases, with the addition that in the last case the stockholders who objected to what they termed an *ultra vires* contract were charged with knowledge of and participation in the act they claimed to be illegal and were in no condition to complain. A corporation cannot retain benefits derived from an *ultra vires* contract; and at the same time treat the contract as entirely void, unless, perhaps, in cases where the other party has assisted willfully in putting it beyond the power of the corporation to return what is received on such contract. (6) Where the corporation has permitted its officers to engage in *ultra vires* transactions, the officers commit a wrong or tortious act without the fault of the injured party, the corporation is estopped from taking advantage of the *ultra vires* character of the original undertaking." As to the doctrine that charters not expressly or by implication authorizing an act prohibit it and render such act void, see Safford *v.* Wyckoff, 1 Hill, 11; Leavitt *v.* Palmer, 3 Comst. 19; Talmage *v.* Pell, 3 Seld. 328; Tracy *v.* Talmage, 14 N. Y. 162, 179; Bissell *v.* Michigan So., etc., R. R. Co., 22 N. Y. 258, 289; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 68; Alexander *v.* Cauldwell, 83 N. Y. 480, 485; Nassau Bank *v.* Jones, 95 N. Y. 115, 122; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 572; Hood *v.* New York & New Haven R. R. Co., 22 Conn. 502; Elmore *v.* Naugatuck R. R. Co., 23 Conn. 457; Mutual Savings Bank *v.* Meriden Agency Co., 24 Conn. 159; Naugatuck R. R. Co. *v.* Waterbury Button Co., 24 Conn. 468. Contracts held *ultra vires* and void: Twiss *v.* Guaranty Life Assn. of Iowa, (1893) 87 Iowa, 733; s. c., 55 N. W. Rep. 8,

paying the taxes thereon, performing certain contracts theretofore made by the former company and the payment to the former company, or to its use, certain sums of money, was *ultra vires*, based upon the doctrine that a charter granted to a railway corporation for the purpose of constructing, owning and maintaining a railroad, confers a trust special to the corporation in relation to the purposes of its creation, and hence such a corporation has no power to enter into contracts foreign to those for which it was created, or to delegate its franchises, or to incapacitate itself to discharge its duties to the public by a lease or sale of its road. Agreements of that character, unauthorized by its charter, are inconsistent with the obligations of the corporation to the public, *ultra vires* and void.[1] The court held that the contract for lease

following Lucas *v.* Transfer Co., 70 Iowa, 542; s. c., 30 N. W. Rep. 771. See on *ultra vires* Wardner, Bushnell & Glessner Co. *v.* Jack, 82 Iowa, 435; Carson City Sav. Bank *v.* Elevator Co., 90 Mich. 550; Seymour *v.* Association, 64 Hun, 632; Richelieu Hotel. Co. *v.* Encampment Co., 140 Ill. 248; s. c., 29 N. E. Rep. 1044, affirming 41 Ill. App. 268; Dewey *v.* Railway Co., 91 Mich. 351; Heims Brewing Co. *v.* Flannery, 137 Ill. 309; Buckeye Marble & Freestone Co. *v.* Harvey, (1892) 92 Tenn. 115; s. c., 20 S W. Rep. 427; As to a corporation with the usual powers, when not prohibited by its articles of incorporation, contracting for the surrender of its stock, see Rollins *v.* Shaver Wagon & Carriage Co., (1890) 80 Iowa, 380; s. c., 45 N. W. Rep. 1037. When a plea of *ultra vires* will be held sufficient. Gillespie *v.* Davidge Fertilizer Co., 66 Hun, 627; s. c., 20 N. Y. Supp. 833. When a contract will not be declared *ultra vires*. Nashua & Lowell Railroad Corp. *v.* Boston & Lowell R. Corp., (1892) 157 Mass. 268; s. c., 31 N. E. Rep. 1060; Odd Fellows Hall Association of Portland *v.* Hegele, (1893) 24 Ore. 16; s. c., 32 Pac. Rep. 679; Welsh *v.* Ferd Heim Brewing Co., 47 Mo. App. 608; Glass *v.* Ferd Heim Brewing Co., 47 Mo. App. 639; United Lines Telegraph Co. *v.* Boston Safe Deposit & Trust Co., 147 U. S. 431; s. c., 13 Sup. Ct. Rep. 396. For illustrations of contracts which have been held not to be *ultra vires*, see Wolf *v.* Arminus Copper Mine Co., 6 Misc. Rep. 562; s. c., 27 N. Y. Supp. 642, in which Abbot *v.* Rubber Co., 33 Barb. 578, was distinguished; Ashenbroedel Club *v.* Finlay, 53 Mo. App. 256. As to *ultra vires* generally, see Oelbermann *v.* New York & N. Ry. Co., 77 Hun, 332; s. c., 29 N. Y. Supp. 545; Pauly *v.* Coronado Beach Co., 56 Fed. Rep. 428; Denny Hotel Co. *v.* Schram, 6 Wash. 134. Estopped to plead *ultra vires*. Kennedy *v.* California Sav. Bank, (1894) 101 Cal. 495; s. c., 35 Pac. Rep. 1039; Kadish *v.* Garden City Equitable Loan & Bldg. Assn., 47 Ill. App. 602; Smith *v.* White (Tex. Civ. App.) 25 S. W. Rep. 809; Head *v.* Cleburne Bldg. & Loan Assn., (Tex. Civ. App.) 25 S. W. Rep. 810; Cameron *v.* First Nat. Bank, 4 Tex. Civ. App. 309; s. c., 23 S. W. Rep. 334; Butte Hardware Co. *v.* Schwab, (Mont.) 34 Pac. Rep. 24; Magee *v.* Pacific Improvement Co., 98 Cal. 678; s. c., 33 Pac. Rep. 772.

[1] Board of Commissioners of Tippecanoe Co. *v.* La Fayette, Muncie &

of this road was made without authority of law; that the board of directors and agents of the corporation had no power to make it; and that it was in violation of the rights of the stockholders and in contravention of public policy.[1] The court said, however: "We do not decide that railroad companies cannot become lessors or lessees of other railroad companies, or make other contracts with other railroad companies, for the purpose of running their lines in conjunction, facilitating commerce, travel and transportation, or for any of the legitimate purposes for which railroad companies are organized. There is much in the legislation of the state favoring this view, and many decisions of this court sustaining the advancing enterprise of the country, but all such contracts must come within the powers of the agency that makes them, and must not violate the rights of stockholders or contravene public policy.[2] It was contended in this case that the Indiana statute of February 23, 1853, entitled an "act to authorize railroad companies to consolidate, etc.," had removed this disability which these principles of law imposed upon such corporations. The Supreme Court held adversely to the contention.[3] It

Bloomington R. R. Co., (1875) 50 Ind. 85.

[1] Ibid.; citing in support of these conclusions: 1 Redf. on Railways, 226, 594, 616, 641, 644, 650; Boston, etc., R. R. Corp. *v.* Salem, etc., R. R. Co., 2 Gray, 1; Black *v.* Delaware, etc., Canal Co., 7 C. E. Green (N. J.), 130; Bissell *v.* Michigan Southern, etc., R. R. Co., 22 N. Y. 258; Fall River Iron Works Co. *v.* Old Colony, etc., R. R. Co., 5 Allen, 221; Great Luxembourg Ry. Co. *v.* Magnay, 25 Beav. 586; Beman *v.* Rufford, 1 Sim. (N. S.) 550; Bagshaw *v.* Eastern Union Ry. Co., 2 Macn. & G. 389; Bank of Middlebury *v.* Edgerton, 30 Vt. 182; Marsh *v.* Fulton Co., 10 Wall. 676; Colman *v.* Eastern Counties Ry. Co., 10 Beav. 1; Township of Pine Grove *v.* Talcott, 19 Wall. 666; East Anglian Ry. Co. *v.* Eastern Counties Ry. Co., 11 C. B. 775; Richardson *v.* Sibley, 11 Allen, 65; Eidman *v.* Bowman, 58 Ill. 444; Stewart's Appeal, 56 Pa. St. 413; Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 7 Wis. 59; Eldridge *v.* Smith, 34 Vt. 484; Perrine *v.* Chesapeake, etc., Co., 9 How. 172; Bedford R. R. Co. *v.* Bowser, 48 Pa. St. 29; Pearce *v.* Madison, etc., R. R. Co., 21 How. 441; European, etc., Ry. Co. *v.* Poor, 59 Me. 277; Wright *v.* Bundy, 11 Ind. 398; Eaton & Hamilton R. R. Co. *v.* Hunt, 20 Ind. 457; Board of Comrs., etc., *v.* Reynolds, 44 Ind. 509; Sparrow *v.* Evansville, etc., R. R. Co., 7 Ind. 369; Fisher *v.* Evansville, etc., R. R. Co., 7 Ind. 407; Booe *v.* Junction R. R. Co., 10 Ind. 93; McCray *v.* Junction R. R. Co., 9 Ind. 358; Shelbyville, etc., Turnpike Co. *v.* Barnes, 42 Ind. 498.

[2] Board of Commissioners of Tippecanoe Co. *v.* La Fayette, Muncie & Bloomington R. R. Co., (1875) 50 Ind. 85, 115.

[3] Ibid. The court said: "That act is 'to authorize railroad companies to consolidate their stock with the stock

appeared in a case before the United States Supreme Court that a corporation organized under the laws of Pennsylvania as a manufacturing corporation with a certain capital stock, for twenty years, for "the transportation of passengers in railroad cars constructed and owned by the said company" under certain patents, carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting the cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers. Seven years afterwards, by special statute, the charter was extended for ninety-nine years, and the corporation was empowered to double its capital stock, and "to enter into contracts with corporations in this or any other state for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal property." Upon the passage of this statute this corporation entered into a contract with a corporation of another state organized for similar purposes, by which it leased and transferred to the latter all its cars, railroad contracts, patent rights and other personal property, moneys, credits and rights of action, for the term of ninety-nine years, except so far as the contracts and patents shall expire sooner; and covenanted not to "engage in the business of manufacturing, using or hiring sleeping cars" while the contract should remain in force; the lessee engaged to pay all the existing debts

of railroad companies in this or in an adjoining state, and to connect their roads with the roads of said companies,' etc. The title nowhere mentions a lease or a sale. Indeed, the words 'to connect their roads with the roads of said companies' would seem to exclude such a conclusion. To connect one road with another does not fairly mean to lease it or sell it to another. Much less can it mean to authorize the corporation to sever the trunk of its road, transfer the western division, for an unlimited time, to the corporation of another state, and subordinate its eastern division to the western and to a foreign corporation. The third section of the act is not strongly relied upon. It enacts that a railroad company 'shall have power to make such contracts and agreements with any such road constructed in an adjoining state, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper.' Even if this section could be held to authorize the transfer of the use of one road to another, the words cannot fairly mean the transfer of one division of a road to the injury of another division of the same road, thus putting the two divisions in direct antagonism, both in their interest and connection. Although the words, 'as to such board of directors may seem proper,' express a general power, they must be construed in reference to the subject-matter to which they are applied, and limited within the powers of the corporation and the rights of the stockholders."

of the lessor corporation and to pay a fixed sum annually, during the term of ninety-nine years, unless the contract was sooner terminated as provided in its terms. The lessor corporation brought this action to recover of the lessee corporation a large sum of money claimed to be due from it on this contract. The Supreme Court held the contract to be unlawful and void, because it was *ultra vires* the corporate powers of the lessor corporation and involved an abandonment of its duty to the public; also, that the suit was not maintainable nor could there be a recovery by the lessor corporation upon the contract even though the lessee had enjoyed the benefits of the contract.[1] In the United States

[1] Central Transportation Co. *v.* Pullman's Palace Car Co., (1891) 139 U. S. 24; s. c., 11 Sup Ct. Rep. 478. Mr. Justice GRAY in the opinion which he delivered for the court quoted from and reviewed the following cases: York & Maryland Railroad *v.* Winans, 17 How. 30; Pearce *v.* Madison & Indianapolis Railroad, 21 How. 441; Zabriskie *v.* Cleveland, etc., Railroad, 23 How. 381; Thomas *v.* Railroad Co., 101 U. S. 71; Branch *v.* Jesup, 106 U. S. 468; Pennsylvania Railroad *v.* St. Louis, etc., Railroad, 118 U. S. 290; Salt Lake City *v.* Hollister, 118 U. S. 256; Willamette, etc., Co. *v.* Bank of British Columbia, 119 U. S. 191; Green Bay & Minnesota Railroad *v.* Union Steamboat Co., 107 U. S. 98; Pittsburgh, etc., Railway *v.* Keokuk & Hamilton Bridge, 131 U. S. 371; Oregon Railway *v.* Oregonian Railway, 130 U. S. 1. Upon a contention that the lessor corporation was on a different footing from railroad corporations and the like, it was said: "The plaintiff * * * was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. Ardesco Oil Co. *v.* North American Oil Company, 66 Pa. St. 375; Treadwell *v.* Salisbury Manuf. Co., 7 Gray, 393. But the purpose of its corporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company as a carrier of passengers owes to the public independently of possessing any rights of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; York & Maryland Railroad *v.* Winans, 17 How. 30, 39; Railroad Co. *v.* Lockwood, 17 Wall. 357; Liverpool & Great Western Steam Co. *v.* Phœnix Ins. Co., 129 U. S. 397." After referring to the express pow-

Circuit Court for the northern district of Washington it has been held that a railroad company organized under the laws of that state has no authority to transfer its franchises, except by sale and conveyance or lease made in accordance with the statutes relating to the transfer of titles to such property; and where by a so-called "traffic agreement," the trustees, without the consent of the minority stockholders, in effect, transferred to another railroad company the entire control and management of the property, for practically the legal lifetime of the corporation, such contract was illegal and void.[1] The Supreme Court of New

ers conferred upon the corporation, it was said: "Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties." This case has been followed in Hamilton *v.* Savannah, F. & W. Ry. Co., (1892) 49 Fed. Rep. 412.

[1] Earle *v.* Seattle, Lake Shore & Eastern Ry. Co., (1893) 56 Fed. Rep. 909. The only authority found in the charter of the company which had thus leased the control of the Washington corporation, was where the congress of the United States had authorized it "to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon said company by the congress of the United States, by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid or assistance to its own use for the purpose aforesaid." In the opinion rendered in this case it is said: "The statute referred to does not prescribe the manner whereby purchases or leases of railways may be consummated, otherwise than by the general provisions of the several statutes relating to corporations and to conveyances of property. A railroad corporation cannot lawfully transfer its franchise without authority emanating from the power which granted it. And an unauthorized transfer, made in disguise, as by a traffic contract, will not, in a judicial proceeding, be treated with greater favor than if the contract expressed plainly the real intention of the parties. On the subject of traffic contracts the text of Green's Brice's Ultra Vires (page 427), concisely and clearly states the law, as follows: 'Corporations may make all necessary arrangements for cheaply and expeditiously developing or carrying on their particular business; but it is another thing, going beyond this, to enter into contracts, for instance, by which the exclusive control or the exclusive right of working the

York, in General Term, affirmed the denial of a motion to continue an injunction restraining the directors of a corporation from transferring its property, assets and business to another corporation, where it appeared from affidavits of the directors that they did not contemplate such action, but merely the leasing of important rights and functions to the other corporation.[1] This was a case where a stockholder of a Minnesota corporation had made complaint, in which he alleged that eight of the nine directors of the company owned or controlled a majority of the shares of stock, and were disposed to lease and transfer the property and effects of the company for the term of twenty-five years to a corporation created under the laws of the state of New Jersey, and, in effect, to transfer its business to that company, for one-half the net profits yielded by it; and that this was in contravention of its charter, and the laws of the state of

line is handed over to other parties. All such arrangements, whatever their form, however disguised, are *ultra vires* and void. This applies with peculiar force in the case of those bodies which have been created for what may be conveniently styled 'public purposes.'" The court continued: "Now, assuming that the section of the charter above quoted does authorize the Northern Pacific Railroad Company to take the benefit of rights and privileges, and exercise new powers, granted and conferred by the state of Washington, the question whether the contracts and proceedings by which it has gained control of the Seattle, Lake Shore and Eastern Company's franchise and business are *ultra vires* or not depends upon whether the requirements of the state laws in this regard have been met. There has been no sale and conveyance, nor lease, of the railroad property, in accordance with the laws of this state relating to the manner of transferring titles to such property. As the parties have not done what the statute authorizes to be done, I do not think that the deal between them has any governmental sanction whatever. No consolidation has been attempted, and yet the transaction is of such resemblance to a consolidation that the legal principles by which the validity of proceedings to effect a consolidation of corporations may be applied. This idea leads to consideration of the contract rights of individual stockholders, and the rule is that a corporation cannot be consolidated with another if the right to do so was not by the law, or the constituting instruments, given at the time of its creation, without the unanimous consent of its stockholders. The law on this subject is thus stated in 2 Mor. Priv. Corp. § 951: 'A corporation cannot consolidate with another company, even pursuant to legislative authority, except with the consent of all its shareholders. An unauthorized consolidation may be prevented by any dissenting shareholder, or may be treated as ground for severing his connection with the company, by a rescission of his subscription.'"

[1] Small *v.* Minneapolis Electro-Matrix Co., (1890) 10 N. Y. Supp. 456.

Minnesota, under which it was incorporated. DANIELS, J., for the court, said: "If the facts were satisfactorily established, a case for an injunction would be presented; for the directors or trustees do not appear to have been invested with that power, either by its charter or the laws of the state in which it exists; and, in the absence of explicit authority to transfer its property, effects and business to another company, it cannot be presumed to possess that power. At least, the directors or trustees, having only the power to manage and conduct its affairs under the charter, could legally make no such disposition of its property and affairs; for, instead of managing and conducting its business, that would be a destruction of its business, and an abdication of their own powers and authority, which could not take place without violating the law and their own official obligations; and that, even a majority owner of the shares of the company would be entitled by action to restrain and prevent."[1] Referring to the admission in the answer of the directors, that a resolution was adopted by the majority of the board, subject to the approval of the shareholders, to execute a lease to the New Jersey corporation of certain important rights and functions of the Minnesota corporation, and the stated intention to extend the leasehold interests or rights no further than was permitted by the laws of Minnesota, it was said: "And it certainly goes no further in its language or fair implication to this extent, which does not transcend, but limits itself within the bounds of the law; for the exercise of lawful authority for the promotion of the interests and prosperity of the company is intrusted to the use and employment of its board of directors or trustees; and when they may, in good faith, be exercised, a case will not be presented for the interposition of a court of equity by injunction."[2]

§ 274. **Loaning funds of corporation.**— The power in a corporation to loan its funds cannot be implied from the power expressly given it to borrow money, or any implied power it has to borrow; and if it has no express power given it to loan its funds, it cannot be implied from the declared purposes and objects for which its charter was granted where it is not created for banking purposes, or to conduct some business usual in bank-

[1] Citing Abbot *v.* Rubber Co., 33 Barb. 578, 591.

[2] Citing Beveridge *v.* Railroad Co., 112 N. Y. 1; s. c., 19 N. E. Rep. 489.

ing; and in case the corporation is not created, as may appear from its articles of incorporation, for pecuniary profit, this declaration would exclude the power of loaning its funds.[1] And where a corporation has no power to loan its funds, a promissory note and mortgage given as security to the corporation will be void and not enforceable in equity.[2] An Alabama corporation was incorporated with a capital of $1,000,000, to be paid in in cash and such other money as it might receive in trust, one-half of which capital it was required to invest in bonds or notes secured by mortgage on land within the state of Alabama, and the remaining half of the capital stock, together with the premiums and profits received by it, and the moneys received in trust, may be invested in stocks, loaned to any city, county or company, or be invested in such real or personal securities as it might deem proper. The Supreme Court of Alabama held that the corporation had no power to lend its credit by making bonds to fall due in future, and exchanging such bonds for the bonds of an individual for the same amount.[3] A corporation organized under the laws of California for the purpose of acquiring a certain tract of land, laying it out as a town and selling it in lots, blocks, etc., and acquiring "street railroad or other rights and franchises, telegraph, telephone or other similar franchises, and gas and electric light franchises, over the said property, or any part thereof," subscribed for shares of stock in a manufacturing corporation. Such subscription was held to be *ultra vires* and void.[4]

[1] Chambers *v.* Falkner, (1880) 65 Ala. 448.

[2] Ibid.

[3] Smith *v.* Alabama Life Insurance & Trust Co., (1843) 4 Ala. 558. This same corporation was held, under its articles of incorporation, to have the power to purchase a bill of exchange, in Gee *v.* Alabama Life Ins. & Trust Co., (1848) 13 Ala. 579.

[4] Pauly *v.* Coronado Beach Co., (1893) 56 Fed. Rep. 428. The court placed its ruling upon the doctrine on this subject as summed up by the Supreme Court of the United States, in Central Transportation Co. *v.* Pullman's Palace Car Co., 139 U. S. 48; s. c., 11 Sup. Ct. Rep. 484, in these words: "The charter of a corporation read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts; and this, upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have

§ 275. **Investing funds of corporation in stock of others.**— In a Maine case it appeared that a savings institution subscribed for $50,000 of the capital stock of a manufacturing corporation. Having no money to pay for it, another corporation paid the money to the manufacturing corporation, took the notes of the savings institution for the amount, and had a certificate of stock issued in its name as collateral security for the payment of the notes. The Supreme Court of Judicature of that state held that upon principle, as well as authority, it was not within the authority of the trustees of a savings institution to invest its funds in the stock of a manufacturing corporation, unless expressly authorized so to do by its charter, or the public laws of the state. They placed their decision against the power of the savings bank to enter into this contract upon the broader ground that it was not competent for the trustees of the savings bank to purchase on credit property of any kind, not needed for immediate use or the investment of existing funds; that such power was not expressly conferred upon it, nor could it be sustained as an incidental power.[1]

never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law." In Richelieu Hotel Company *v.* International Military Encampment Co., (1892) 140 Ill. 248; s. c., 29 N. E. Rep. 1044, a subscription by this incorporated hotel company to V., a contemplated corporation for the purpose of establishing this encampment to draw visitors to the city, etc., was held foreign to the purposes of the hotel company, and the doctrine of *ultra vires* must be applied to it.

[1] Franklin Company *v.* Lewiston Institution for Savings, (1877) 68 Me. 43. The ruling as to the first point was based upon what the court considered the result of the rules declared in the following cases bearing upon the powers of corporations, to wit: Beaty *v.* Lessee of Knowler, 4 Pet. 152; s. c., 1 McLean, 41; Perrine *v.* Chesapeake & Delaware Canal Co., 9 How. 172; Farnum *v.* Blackstone Canal Co., 1 Sumner, 46; Bank of Augusta *v.* Earle, 13 Pet. 519; Tombigbee R. R. Co. *v.* Kneeland, 4 How. 16; Runyan *v.* Coster's Lessee, 14 Pet. 122; Dartmouth College *v.* Woodward, 4 Wheat. 518, 636; Hood *v.* New York & N. H. Railroad, 22 Conn. 1 and 502; Berry, Receiver, *v.* Yates, 24 Barb. 199; Mutual Savings Bank *v.* Meriden Agency Co., 24 Conn. 159; Sumner *v.* Marcy, 3 Woodb. & Min. 105; Pearce *v.* Railroad, 21 How. 441. It was suggested in Franklin Company *v.* Lewiston Institution for Savings, *supra*, that it might be convenient in this way to provide in advance for the investment of funds that might afterwards come into the possession of a bank. To this the court said: "We think the creation of debts by corporations or individuals for no other purpose than to provide a ready way to dispose of future acquisitions a proceeding of very questionable convenience; that in the great majority of cases it would be likely to prove, as it did in this case, very inconvenient. But it is sufficient answer to say that the law im-

It was further held in this case that the lender of the money, the corporation plaintiff, having participated in the illegal transaction, could not claim the privileges of a *bona fide* holder of commercial paper; and that the savings institution, having received no benefit from the transaction, was not estopped to set up the defense of *ultra vires*.[1] In an action brought by one Ohio corporation, an iron company, against another, a railway company, for goods sold and delivered to the latter, the defense made was that there had been a contract between the two corporations, by the terms of which the iron company was to sell to the railway company goods to a certain amount, and to receive in payment thereof so many shares of stock in the latter. This involved the question of the authority of the iron company to take stock in the railway company. Upon this subject the Supreme Court of Ohio stated the law in that state to be as follows: "We think it well settled as a result of the decisions in this state, as well as elsewhere, that an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is *ultra vires*, and void. Mr. Morawetz, in stating this to be the law, observes: 'The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations; moreover, it would, under ordinary circumstances, be a violation of the charter of an existing company to subscribe for shares in a new company and assume the resulting liabilities.' Priv. Corp. § 433. There has been no direct decision upon the question by this court, but such has been the universal holding elsewhere.[2] These cases all proceed upon the principle that the powers of corporations organized under legislative statutes are such and such only, as those statutes confer, or that may be fairly implied therefrom. This doctrine was clearly announced and applied in Straus *v.* Eagle Ins. Co., 5 Ohio St. 59, and has been firmly adhered

poses no duty upon the trustees of savings banks to provide for the investment of future funds or future deposits. The whole duty is performed when they have provided safe investments for the funds already committed to their care. To hold that they may create debts binding upon existing depositors whose money, after all, may never be committed to their care, would be a doctrine as startling as it would be unprecedented."

[1] Franklin Co. *v.* Lewiston Institution for Savings, (1887) 68 Me. 43.

[2] Citing Railroad Co. *v.* Railroad Co., 31 N. J. Eq. 475; Franklin Co. *v.* Lewiston Savings Inst., 68 Me. 43; Railroad Co. *v.* Collins, 40 Ga. 582.

to in this court. Railroad Co. v. Hinsdale, 45 Ohio St. 556, 573. No claim is made by the defendant that the iron company had any express statutory authority to use its capital or assets in aid of the construction of a railroad by subscription to its capital stock or otherwise. The only averment as to this, is that it, the iron company, conceived that it would be benefited by the reduction of the price of coal at Cleveland, its place of business, and the market which the construction of the road would afford for its manufactures, and by these considerations was induced to make the subscription. But all this can be of no avail in the face, at least, of the prohibition contained in section 3266 of the Revised Statutes, that, 'No corporation shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation.' There was then, as we think, no authority whatever in the iron company to make a valid subscription to the capital stock of the railway company * * * ."[1]

§ 276. **Directors of an insurance company raising a guaranty capital.**— The directors of a mutual life and fire insurance company, a New Jersey corporation, after conducting its business for a while, by resolution determined upon and formulated a plan to raise a guaranty capital to the amount of $150,000, to be used for the payment of losses when other means were exhausted. This was done by obligations for money secured by mortgage from its members. Here we have an action on a bill filed to recover on the defendant's mortgage what had been assessed against him. The answer of defendants set up the facts and circumstances under which the mortgage was given, and insisted that the action and all the proceedings of the directors in raising the guaranty capital were illegal, in violation of the charter of the company and against public policy, and, therefore, the company could not enforce the contract made with any of the contributors to the fund. After expressing that his disposition was to enforce this contract on the part of the contributors, upon the question directly raised, Chancellor WILLIAMSON said: "I cannot see how the contract with the contributors to this guaranty fund can be enforced in a court of law or equity, without repudiating altogether the principle of the common law,

[1] Railway Co. *v.* Iron Co., (1888) 46 Ohio St. 44, 49, 50.

which has been but re-enunciated by our statute (Nixon, 138, § 3), that no corporation shall possess or exercise any corporate powers, except such as shall be expressly given in its charter, or which shall be necessary to the exercise of the powers so enumerated and given. Was it within the scope of the powers of this corporation to provide any other capital or fund as the basis of the basis which it was empowered to pursue, than are provided by the charter itself? If it was illegal for them to create such a capital, then a contract which they may have made for its payment cannot be enforced. This corporation was incorporated for the purpose of insuring lives and loss by fire. The charter provides the fund out of which losses are to be paid, and it is this feature in the charter which stamps the character of this corporation, and which makes it what its name imports, and what the legislature intended it should be, a *mutual* company. The corporators are mutual insurers, and it is the fund which is made up from the premiums which they contribute, and one per cent on the amount for which each one is insured, out of which they are to be indemnified for any losses. They have no right or authority, by their charter, to create any other fund for the purpose. If they do, it is in violation of the principle which is to govern their mode of doing the business for which they were incorporated."[1]

[1] Trenton Mutual Life & Fire Insurance Co. *v.* McKelway, (1858) 12 N. J. Eq. 133, 135, 136. *Arguendo*, the chancellor further said: "It was admitted, on the argument, that it was not within the scope of the powers of this corporation to create any capital other than that for which the charter provides. It was attempted to escape the consequences of such an act by the argument that this was nothing more than a contract for a loan of money, out of which the corporation might be enabled to meet the losses that might be incurred. It cannot be denied but that the corporation might borrow money under some circumstances, and that a contract *bona fide* made for such loan would be illegal [legal ?], and not in contravention of the charter. For instance, should the corporation incur a loss, and not have the available means promptly to meet it, it would not be illegal for them to make a loan to meet the exigency. But they cannot, under pretense of borrowing money, provide a fund for the purpose of giving credit to the company. The question is as to the *bona fides* of the transaction. It matters not what you call it, the name does not affect its real character. Was this a *bona fide* loan of money, or a contract for a loan, made in the ordinary course of business, and to meet an exigency which would bring such a contract within the compass of the legitimate powers of the company? Or was it a contract to provide a capital or fund for the purpose of giving a credit and character to the company which is entirely for-

§ 277. Converting "common" into "preferred" stock.— In a leading New York case, while the Court of Appeals admitted the right of corporations to classify their stock at the outset by issuing some "common" and some "preferred" stock, it was held that it was not, under the circumstances disclosed, in the power of the corporation involved in this case to convert some of its shares into preferred with a view of raising money from its stockholders, as it was not a "borrowing" of money in its proper sense, but an interference with the vested rights of the stockholders as originally constituted.[1] A manufacturing corporation

eign to its charter? Can this be called a legitimate contract for a loan in the ordinary course of business?" The chancellor then stated the terms of the contract, and, as to the acts of the directors in the matter, said: "They did not make the contract under a mistake, intending to make a mere loan, and supposing that they were legitimately exercising a power to do so. That was not their purpose. They had a different object in view. It is expressed in their bill of complaint, and recorded several times upon their minutes. The bill of complaint alleges that the directors concluded to enter into this negotiation because, in their opinion, it would prove advantageous to the corporators to provide a guaranty capital as an additional security for the payment of losses. Here, then, is the admission of the company upon the record, that this contract was made for an illegal purpose. The minutes of the corporation show more; they show that this was a device for the purpose of complying with the laws of the state of New York, which provides that no insurance company shall transact business in that state unless such company is possessed of an actual capital of $150,000. The simple question then is presented, could this corporation lawfully adopt any scheme or device by which they could create a capital of $150,000, for the purpose of acquiring a credit upon which to transact business? In my judgment, they could not, and any contract entered into for such a purpose is unlawful, and cannot be enforced."

[1] Kent *v.* Quicksilver Mining Co., (1879) 78 N. Y. 159. The court, however, would not declare that a corporation could never, rightfully, against the dissent of a portion of its stockholders, make some of its stock "preferred." FOLGER, J., speaking for the court, said: "The transaction is not to be looked upon as other than a preference of one class of stockholders to another; as giving to the first class a perpetual, inextinguishable prior right to a portion of the earnings of the company before the other class might have anything therefrom. It was none other than the creation of a 'preferred stock.' Then there arises the query whether there was at that time power in the corporation to distinguish between the stockholders in it, to form them into two classes, and to give to one class rights in the corporate property, business and earnings from which the other was shut out. We are not prepared to say that, at the first, the corporation might not have lawfully divided the interest in its capital stock into shares arranged in classes, preferring one class to another in the right it should have in the profits of the business. The charter gave power to make such by-laws as

organized under the laws of New York was organized with a capital stock of 7,500 shares. At a certain time it owed $300,000, and for the purpose of paying it, stockholders representing all the stock, except that mentioned hereafter, and the corporation executed under their hands and seals a contract by which the shareholders agreed to surrender to the corporation without consideration forty per cent of their stock, which

it might deem proper consistent with the Constitution and law; and to issue certificates of stock representing the value of the property. We know of nothing in the Constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock with peculiar privileges to one share over another, and then offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what rights he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired. This corporation did otherwise. A by-law was duly made which declared the whole value of its property and the whole amount of its capital stock and divided the whole of it into shares equal in amount and directed the issuing of certificates of stock therefor. It is not to be said that this by-law authorized anything but shares equal in value and in right; or that the taker of one did not own as large an interest in the corporation, its capital, affairs and profits to come, as any other holder of a share. Certificates of stock were issued under this by-law that gave no expression of anything different from that. When that by-law was adopted it was as much the law of the corporation as if its provisions had been a part of the charter. Presbyterian Church *v.* City of New York, 5 Cow. 538. So it is said in Grant on Corporations, page 80, in a qualified way. Thereby, and by the certificate, as between it and every stockholder, the capital stock of the company was fixed in amount in the number of shares into which it was divisible, and in the peculiar and relative value of each share. The by-law entered into the compact between the corporation and every taker of a share; it was in the nature of a contract between them. The holding and owning of a share gave a right which could not be divested without the assent of the holder and owner; or unless the power so to do had been reserved in some way. Mech. Bank *v.* N. Y. & N. H. R. R. Co., 13 N. Y. 599–627. Shares of stock are in the nature of *choses in action*, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened against the will of the owner than can any other right unless power is reserved in the first instance when it enters into the constitution of the right; or is properly derived afterwards from a superior law given. The certificate of stock is the muniment of the shareholder's title and evidence of his right. It expresses the contract between the corporation and his co-stockholders and himself; and that contract cannot, he being unwilling, be taken away from him or changed as to him without his prior dereliction or under the

amounted to the sum of the indebtedness, and authorized the corporation to pay upon shares to be issued and sold in the place of those surrendered ten per cent per annum on the face value of the shares for five years or such portion thereof as could be paid out of the annual net profits of the corporation. The following statement was indorsed upon the certificates for the 3,000 shares to be issued in lieu of those surrendered, to wit: "Issued subject to agreement with stockholders, dated May 22, 1885, on file in

conditions above stated. Now it is manifest that any action of a corporation which takes hold of the shares of its capital stock already sold and in the hands of lawful owners and divides them into two classes, one of which is thereby given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom and is given an equal share afterwards with the other in what earnings may remain — destroys the equality of the shares, takes away a right which originally existed in it and materially varies the effect of the certificate of stock. It is said that when a corporation can lawfully buy property or get money on loan, any known assurance may be exacted and given which does not fall within the prohibition, express or implied, of some statute (Curtis *v.* Leavitt, 15 N. Y. 9, 66, 67); and that is sought to be applied here. But the prohibition to such action as this is found, not indeed in a statute commonly so called, but in the constitutional provision which forbids the impairment of vested rights save for public purposes and on due compensation. The right which a stockholder gets on the purchase of his share and the issue to him of the certificate therefor is such a vested right. It is contended that the power so to do is an incidental and implied power necessary to the use of the other powers of the corporation, and is a legitimate means of investing money and securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money and to secure the repayment of it with a compensation for the use of it. But that is when it is done in such way as to put the burthen upon every share of stock alike, and to enable every share of stock to be relieved therefrom alike, in such way as to preserve the equality of right and privilege and value of the shares, and maintain intact the contract thereto with the stockholder." The court then called attention to the distinguishing points in the cases relied upon to support the views *contra* to those of the court as follows: "Citations are made to us for the converse of this; but they do not come up — sometimes in their facts, sometimes in their declarations — to the necessity of the proposition. Either it is where the capital is not limited and it is new shares that may be issued with a preference, and where there is express power to borrow on bond and mortgage (2 Redf. on Rways. chap. 33, sect. 4; Harrison *v.* Mex. Rw., 12 Eng. Rep. 793); or the amount of the capital has not been reached and such stock is issued therefrom (Hazelhurst *v.* Savannah R. R., 43 Ga. 53; Totten *v.* Tison, 54 Ga. 139); or there was legislative authority (Davis *v.* Proprietors, 8 Met. 321; Rutland R. R. Co. *v.* Thrall, 35 Vt. 545); or a restriction to authorized capital and there was unanimous consent of the stockholders (Prouty *v.* M. S. & N. I.

the treasurer's office, entitled to first lien on net profits to the amount in such agreement provided. [Signed.] Edw. L. Wood, *Treasurer*." The shares so issued were sold at par and the debt paid. On the back of the shares surrendered was printed, "Profits assigned." The certificates representing the shares which were not represented in the signature to the agreement above mentioned were at that time, with properly executed power of attorney for assignment and transfer, in the hands of a creditor of the owner of the shares as collateral security for a loan; the loan not being paid at maturity the shares were sold regularly to a purchaser, who brought this action against the company to have issued to him a certificate of shares to the amount named in the certificate so purchased, he having refused what was tendered him by the company, a certificate of shares with the words indorsed thereon of "Profits assigned." The New York Court of Appeals held that the purchaser was entitled to an unconditional certificate for these 100 shares upon the same principle as in the last case cited, that the action of the corporation here was an interference with the vested rights of the non-assenting stockholders.[1]

§ 278. **The effect of laches on the part of complaining stockholders in such cases.**— In the leading New York case, where the conversion of common stock into preferred was held to have been *ultra vires* the corporation, the findings of the court on the trial showed that the by-laws empowering the creation

R. R., 1 Hun, 663; 43 Ga. 53, *supra*); or there was power to redeem, which was a transaction in the nature of a debt (Westchester, etc., R. R. Co. *v.* Jackson, 77 Pa. St. 321); or the opinion was *obiter* (Bates *v.* Androscoggin R. R. Co., 49 Me. 491); or it was the case of a subscription for stock with a condition for interest until the corporation was in operation (Richardson *v.* Vt. & Mass. R. R. Co., 44 Vt. 613); or it was an action on a subscription more favorable to defendant than to other subscribers, and it was held that defendant could not set up the lack of equality (Evansville R. R. Co. *v.* Evansville, 15 Ind. 395); or a solemn determination of this question was not necessary for the disposal of the case (Williston *v.* M. S. & N. I. R. R. Co., 13 Allen, 400); or the issue was authorized by the articles of association (In re A'D. St. Nav. & Col. Co., 20 L. R. [Eq.] 339) or there was full knowledge on the part of all concerned (Lockhart *v.* Van Alstyne, 31 Mich. 81); or the power in the corporate body was conceded, and it was denied that it existed in the directors. McLaughlin *v.* D. & W. R R., 8 Mich. 100."

[1] Campbell *v.* American Zylonite Co., (1890) 122 N. Y. 455. FOLLETT, Ch. J., very fully discusses the rights of stockholders in the opinion rendered in this case by him for the court.

and issue of the preferred stock were authorized at a stockholders' meeting regularly called and held and conducted; that the stock was at once offered for subscription to all of the stockholders; that a circular informing them thereof was issued by authority and distributed to the stockholders; that though all of them did not avail themselves of the chance to take it, it was not because the chance was not known. A large number of them did subscribe, and paid money for the privilege to the corporation, and that money went into the assets and business of the company; certificates for the preferred stock were thereupon issued, and it, as well as the common stock, was dealt in by the public; sales were made of the two kinds openly at the Stock Exchange at prices for the one larger than for the other, and quoted in the daily public prints; and from year to year for four years the annual reports of the directors to the stockholders spoke of the two kinds of stock. There was ample knowledge, or means of knowledge, on the part of all stockholders of the action of the corporation in the creation of the two kinds of stock; of the issue of certificates for the preferred stock; of the entry of that stock into the channels of trade; of the public dealings in it at the especial marts for the sale of such property, and of the continued recognition of its existence and validity by the company and the public. FOLGER, J., for the Court of Appeals, said: "It is not to be conceived that the owners of the common stock of this corporation did not have actual knowledge that there had been created a stock having ostensibly greater right and value than their own, and that it had gone into the market and was dealt in by the public interested in the validity of it. For the lapse of four years, however, there was no action of the company, or of an individual stockholder, to have a judicial declaration that the company had exceeded its powers in the creation of the stock, and that it was invalid. We think that these facts, most of which are set forth in the findings in two of the cases, warrant the conclusion of law therein, that the stockholders, by acquiescing in the action of the corporation in making the preferred stock, have ratified and assented thereto, and that the same is binding on them by reason of such assent and ratification."[1]

[1] Kent v. Quicksilver Mining Co., (1879) 78 N. Y. 159, 184, 185. As to the effect of laches in seeking to invalidate a lease of the franchises, etc., of a railroad corporation to another, see St. Louis, Vandalia & Terre Haute R. R.

§ 279. Rules declared by courts as to estoppel of corporations to plead ultra vires.— If a contract by a corporation be not in violation of some public law, or contrary to public policy, *it seems* that only the immediate parties to it, as the corporation itself, or the stockholders, who are parties by representation, hold such a legal position in relation to the contract as to entitle them to raise the question of its validity on account of the alleged want of capacity to make; but if the contract be in violation of some public law or against public policy, in such sense as to make it void and of no effect to any intent, any person standing in a relation of interest to the subject-matter of the contract, and to be affected by its operation, might undoubtedly set up and insist on such fatal vice in it, for the purpose of clearing himself from the consequences of its being carried into effect.[1] In a fully considered case upon how far a corporation is estopped to set up the invalidity of an *ultra vires* contract, where fully performed on the part of the plaintiff, and the benefits of it received by the defendant as a defense to an action, the view of the United States Supreme Court thereon has been stated to be as follows: "A contract of a corporation which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in

Co. *v.* Terre Haute & Indianapolis R. R. Co., (1892) 145 U. S. 393; s. c., 12 Sup. Ct. Rep. 953.

[1] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co., 34 Vt. 2. As to estoppel to plead *ultra vires*, see Chicago Building Society *v.* Crowell, 65 Ill. 453; City of East St. Louis *v.* East St. Louis Gas Light & Coke Co., 98 Ill. 415; Peoria & S. R. R. Co. *v.* Thompson, 103 Ill. 187; Millard *v.* St. Francis Xavier Academy, 8 Bradw. 341; Thomas *v.* Citizens' Horse Ry. Co., 104 Ill. 462.

fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. * * * A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract. The fraud and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice MILLER, in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it,' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.' "[1] The doctrine seems to be settled by the weight of modern authority that a private corporation cannot avail itself of the defense of *ultra*

[1] Central Transportation Co. *v.* Pullman's Palace Car Co., (1891) 139 U. S. 24, 59, 60, 61; s. c., 11 Sup. Ct. Rep. 478. These remarks of Justice MILLER are in Pennsylvania Railroad *v.* St. Louis, etc., Railroad, 118 U. S. 317. As to a bank being estopped to interpose the defense of *ultra vires* to defeat the execution of a trust in favor of its depositors in and lenders to its investment department, by which they were to be secured by reason of its having had the full benefit of the contract, see Ward *v.* Johnson, (1880) 95 Ill. 215; citing West *v.* Menard County Agricultural Board, 82 Ill. 206; Maher *v.* Chicago, 38 Ill. 266; Railway Co. *v.* McCarthy, 96 U. S. 267; San Antonio *v.* Mehaffy, 96 U. S. 315; Morris R. R. Co. *v.* Railroad Co., 20 N. J. Eq. 542.

vires where the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the contract and the performance.[1] Though a contract of a corporation may be strictly *ultra vires*, yet, if not interfered with by the stockholders or the state, and it be not of a class of contracts expressly prohibited, and there be reasonable ground to suppose that the agents of the corporation have acted in good faith, objections raised by the corporation itself or by one having no interest in the question, except for purposes of unjust advantage, will not be listened to by the courts.[2] If a contract made by officers of a corporation with third parties apparently within their powers, upon proof of extrinsic facts of which the third party had no notice, was beyond them, the corporation will be held liable unless it take timely steps to prevent loss or damage to the third parties.[3] A corporation will be estopped to take advantage of the *ultra vires* character of an original undertaking where its officers have been permitted by it to engage in such transactions, and in prosecution of them the officers commit a wrong or tortious act without the fault of the injured party.[4] The benefits derived from an *ultra vires* contract cannot be retained by the corporation and the contract treated as entirely void, unless, perhaps, in cases where the other party to the contract has assisted willfully in putting it beyond the power of the corporation to

[1] Darst *v.* Gale, (1876) 83 Ill. 136; citing Ex parte Chippendale, 4 DeGex, M. & G. 19; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Bradley *v.* Ballard, 55 Ill. 413.

[2] Noyes *v.* Rutland & Burlington R. R. Co., 27 Vt. 110; Rutland & Burlington R. R. Co. *v.* Proctor, 29 Vt. 93; Sturges *v.* Knapp, 31 Vt. 62. As to who may or may not set up the defense of *ultra vires*, see Western Organ Co. *v.* Reddish, 51 Iowa, 55. As to estoppel of a stockholder to complain of an act *ultra vires* on the part of the corporation or its officers, see Des Moines Gas Co. *v.* West, 50 Iowa, 16, involving a fraudulent issue of bonds. Under what circumstances a stockholder cannot object to a plan of reorganization of a corporation as *ultra vires*, see Hollins *v.* St. Paul, M. & M. R. Co., (1889) 9 N. Y. Supp. 909. When an allegation in an answer that the contracts are *ultra vires* the corporation is a sufficient defense, see Gillespie *v.* Davidge Fertilizer Co., (1892) 66 Hun, 627; s. c., 20 N.Y. Supp. 833. When estoppel to defend on the ground that act was *ultra vires*, see Homestead Bank *v.* Wood, (Ct. Cm. Pl. N. Y. City, 1892) 20 N. Y. Supp. 640; s. c., 1 Misc. Rep. 145. Estoppel of corporations to plead *ultra vires*. Carson City Savings Bank *v.* Carson City Elevator Co., (1892) 90 Mich. 550; s. c., 51 N. W. Rep. 641; citing Day *v.* Buggy Co., 57 Mich. 151; Steel Works *v.* Bresnahan, 60 Mich. 337.

[3] Lucas *v.* White Line Transfer Co., 70 Iowa, 541; s.c., 30 N. W. Rep. 771.

[4] Ibid.

return what it received on the contract.[1] The Court of Civil Appeals of Texas has held that where the directors of a corporation, authorized by charter to establish and maintain a hotel, purchased competing hotel property and received the benefit of the transaction for two years they would not be heard to allege that the transaction was *ultra vires*.[2] A corporation cannot set up the limit of indebtedness fixed in its charter as a defense, where the consideration of the indebtedness has been received by it.[3] In like manner it would be estopped from setting up want of authority as a defense as against money advanced to pay indebtedness in excess of the limit of indebtedness fixed in its charter.[4] It is not beyond the powers of a corporation organized for the purpose of owning ditches for the conveyance and sale of water

[1] Ibid.

[2] Steger *v.* Davis, (Tex. Ct. App. 1894) 27 S. W. Rep. 1068. The court concluded its opinion in these words: "In the case of Publishing Co. *v.* Hitson, 80 Tex. 218; s. c., 14 S. W. Rep. 843, and 16 S. W. Rep. 551, the court says: 'It is a reasonable and 'voluntary rule' in its application to agencies, that where the principal, with knowledge of the facts, acquiesces in the acts done under an assumed agency he should not be heard subsequently to impeach them upon the ground that they were done without authority. Kelsey *v.* Bank, 69 Pa. St. 430. This rule applies to corporations as well as to individuals. An express assent, it is said, is not essential on the part of the stockholders to operate as an equitable estoppel upon them. It may be inferred from the failure to promptly condemn the unauthorized although not illegal act, and to seek judicial redress. Sheldon, etc., Co. *v.* Eickemeyer Hat Blocking Machine Co., 90 N. Y. 607, 614.'" See, also, Bond *v.* Manufacturing Co., 82 Tex. 309; s. c., 18 S. W. Rep. 691; Russell *v.* Railway Co., 68 Tex. 646; s. c., 5 S. W. Rep. 686; Stafford *v.* Harris, 82 Tex. 178; s. c., 17 S. W. Rep. 530. As to private corporations, having received the benefits of a contract beyond their power to make, being estopped to set up that excess of authority to excuse them from discharging their part of the contract, see De Groff *v.* American Linen Thread Co., (1860) 21 N. Y. 124; Sherman Center Town Company *v.* Fletcher, 46 Kans. 524; Town Co. *v.* Morris, 43 Kans. 282; s. c., 23 Pac. Rep. 569; Town Co. *v.* Swigart, 43 Kans. 292; s. c., 23 Pac. Rep. 569; Tootle *v.* First National Bank of Port Angeles, (1893) 6 Wash. St. 181; s. c., 33 Pac. Rep. 345; Heims Brewing Co. *v.* Flannery, (1891) 137 Ill. 309; Watts-Campbell Co. *v.* Yuengling, 51 Hun, 302; s. c., 3 N. Y. Supp. 869. The right to object to such contracts, or raise the question of *ultra vires*: Baker *v.* North Western Guaranty Loan Co., 36 Minn. 185; s. c., 30 N. W. Rep. 464; Starin *v.* Edson, 112 N. Y. 206; s. c., 19 N. E. Rep. 670. In Main *v.* Casserly, (1885) 67 Cal. 127, a corporation which had received and retained the consideration of a promissory note executed by it was held liable, although the note was executed in pursuance of a contract *ultra vires*.

[3] Humphrey *v.* Patrons, etc., Association, 50 Iowa, 607.

[4] Ibid.

to sell and convey all its corporate property, provided the sale be made for corporate or lawful purposes, and strangers taking a conveyance of such property have a right to assume, as against the corporation, that the sale was for a lawful purpose. And if the validity of such a sale be contested by the corporation on the ground that it was made for an unlawful purpose it would devolve upon the corporation to show that the party making the purchase knew of such unlawful purpose.[1] Even if unlawful for a corporation to make a sale of all its property to another corporation, and receive in payment therefor the stock of the grantee to be distributed among its own stockholders, if such sale is made, and the contract fully executed, the corporation itself cannot receive back the property sold or set aside the contract on account of its illegality.[2]

[1] Miners' Ditch Company *v.* Zellerbach, (1869) 37 Cal. 543.

[2] Ibid. SAWYER, Ch. J., said: "The term *ultra vires*, whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also sometimes said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or, with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. The opinions in the cases below are extracted from freely to show the class of circumstances under which the plea of *ultra vires* would not be available to the corporation, to wit: Bissell *v.* Michigan Southern & Northern Indiana R. R. Cos., 22 N. Y. 262; Mayor of Norwich *v.* Norfolk Railway Company, 30 Eng. L. & Eq. 128; McGregor *v.* Dover & Deal Railway Co., 17 Jur. 21; s. c., 16 Eng. L. & Eq. 180; Simpson *v.* Denison, 10 Hare, 51; Simpson *v.* Denison, 13 Eng. L. & Eq. 359; Eastern Counties Railway Co. *v.* Hawkes, 35 Eng. L. & Eq. 9; Edwards *v.* Grand Junction Railway Co., 1 Myl. & Cr. 674; Treadwell *v.* Salisbury Manufacturing Co., 7 Gray, 393. Estoppel to plead *ultra vires*: Pauly *v.* Pauly, (Cal. 1895) 40 Pac. Rep. 29; Farmers' Loan & Trust Co. *v.* Toledo, A. A. & N. M. Ry. Co., (1895) 67 Fed. Rep. 49; Roy & Co. *v.* Scott, Hartley & Co., (Wash. 1895) 39 Pac. Rep. 679 (stockholders estopped); Central Building & Loan Association *v.* Lampson, (Minn. 1895) 62 N. W. Rep. 544 (one receiving the benefit of a loan estopped); Bensiek *v.* Thomas, (1895) 66

§ 280. When the doctrine of ultra vires is not applicable. — In an action against a corporation to recover money lost upon wagering contracts which the plaintiff had entered into through and with an agent of the corporation, the latter objected to a recovery against it on the ground that it was a corporation authorized to do a legitimate business, and that, as it could not lawfully authorize its agents to do an illegitimate business, it could not be bound by his acts in the prosecution of it; that the attempt to confer such authority would be *ultra vires*, and the attempted ratification of the agent's acts equally so. The Supreme Court of New York, in General Term, through LANDON, J., to this contention, said: "The position is untenable. A person, equally with a corporation, has no lawful power to do wrong; but both have the capacity to act, and the capacity to act amiss inheres in the capacity to act at all. Given the power and capacity to do right, the actor may nevertheless do wrong. Unless the actor is wholly irresponsible, he must answer for his wrong action, partly in justice to those injured thereby, and partly as a deterrent to its like repetition by himself and others. If the agents of a railroad corporation take my timber or iron against my consent, and convert it into a bridge, to the use of the corporation, the corporation must either restore my property or pay me for it. Here the defendant corporation has obtained the plaintiff's money. It was obtained by means of wager contracts. Confessing that it has the money, the defendant practically argues that, because it could not thus obtain it within its lawful powers, it does not really have it. Pretending to disclaim the transactions by which it obtained the money, it practically argues that its pretended disclaimer gives it title to keep the money. But, in truth, it cannot perfect its disclaimer of the transaction without surrendering its fruits; it cannot retain the money without adopting its agent's method of obtaining it; it cannot insist upon a defense so long as it refuses to qualify itself to interpose it. The doctrine of *ultra vires* is no wise applicable to the case." [1]

§ 281. Rules declared by courts as to estoppel of parties to contracts with corporations to plead ultra vires.—One

Fed. Rep. 104 (corporation estopped); Miller *v.* Washington Southern Ry. Co., (Wash. 1895) 39 Pac. Rep. 673 (corporation estopped).

[1] Peck *v.* Doran Wright Co. (Limited), (1890) 10 N. Y. Supp. 401.

who has received from a corporation the full consideration of his agreement to pay money cannot avail himself of the objection that the contract is *ultra vires*.[1] As corporations are created by public acts of the legislature, and all their powers, duties and obligations are declared and clearly defined by public law, parties dealing with them must take notice of those powers and the limitations upon them at their peril, and will not be allowed to plead ignorance of those powers and limitations in avoidance of the defense of *ultra vires*.[2] The defense that a corporation had no power under its charter to discount notes is not open in an action by the corporation against the maker upon a note discounted by the corporation for him at his instance.[3] Where a corporation indorses notes for another, and is compelled to pay them, in the absence of an express prohibition against such indorsements by the corporation, he for whose benefit the indorsement was made cannot invoke the plea of *ultra vires* as a defense against the enforcement of a chattel mortgage to secure the corporation against its liability upon the notes.[4] The defense cannot be made, in an

[1] Chicago & Atlantic Ry. Co. *v.* Derkes, (1885) 103 Ind. 520.

[2] Franklin Company *v.* Lewiston Institution for Savings, (1877) 68 Me. 43; citing Pearce *v.* Madison & Ind. Railroad, 21 How. 441; Andrews *v.* Insurance Co., 37 Me. 256. Parties receiving benefit of contract cannot insist that contract was *ultra vires*. Shelby *v.* Chicago & Eastern Illinois R. R. Co., (1892) 143 Ill. 385; s. c., 32 N. E. Rep. 438, affirming 42 Ill. App. 339.

[3] St. Joseph Fire & Marine Insurance Co. *v.* Hauck, (1880) 71 Mo, 465.

[4] St. Louis Drug Co. *v.* Robinson, (1881) 10 Mo. App. 587; affirmed in St. Louis Drug Co. *v.* Robinson, (1883) 81 Mo. 18, in which case the Supreme Court said: "Conceding that [the corporation had no authority to indorse notes for the accommodation of others] it is sufficient on this point to say that in a line of decisions of this court unbroken, except in the case of Matthews *v.* Skinker, 62 Mo. 329, it has been held that the question of *ultra vires* can only be raised in a direct proceeding by the state against the corporation, and not in a collateral proceeding by another, except when the charter of the corporation not only specifies, and, therefore, limits it to the business in which it may engage, but, by express terms, or by a fair implication from its terms, invalidates transactions outside of its legitimate corporate business. McIndoe *v.* St. Louis, 10 Mo. 577; Chambers *v.* St. Louis, 29 Mo. 543; Pacific R. R. Co. *v.* Seely, 45 Mo. 212; Land *v.* Coffman, 50 Mo. 243. Since Matthews *v.* Skinker, *supra*, was decided announcing a different doctrine, in the following cases this court returned to the doctrine of the earlier cases: A. & P. R. R. Co. *v.* St. Louis, 66 Mo. 228; St. Jos. Fire & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Thornton *v.* National Ex. Bank, 71 Mo. 221; Union Nat. Bank *v.* Hunt, 76 Mo. 439. The judgment of this court in Matthews *v.* Skinker, *supra*, was on appeal reversed by the Supreme Court of the United States, and the doctrine then announced by that court is in

action by a corporation upon a contract made by it with the defendant, that the corporation, in making the contract, has exceeded the power conferred by its charter or the law under which it is formed.[1] The vendor to a corporation having power to purchase real estate, but prohibited by its charter from making purchases for other than a prescribed purpose, having made a deed to the corporation, cannot have the conveyance set aside and his contract rescinded on the ground that the corporation, in taking the conveyance, did so for a purpose other than that prescribed in its charter, and had exceeded its power.[2] The question whether, in such a case as this, the corporation has exceeded its powers, is one between the state and the corporation, with which a vendor, as a grantor simply of land to the corporation, has no concern.[3] An assignee of railroad stock, who had neither registered his stock nor obtained recognition as a stockholder, it has been held in a federal court, cannot bring suit in behalf of him-

harmony with that which before had been uniformly, and has since been repeatedly, declared by this court." See, also, Franklin Ave. Ger. Sav. Inst. *v.* Board of Education, (1882) 75 Mo. 408; First National Bank *v.* Gillilan, (1880) 72 Mo. 77. It has been held in Brown *v.* Donnell, (1860) 49 Me. 421, an action against the maker by the indorsee of a note given to an insurance company and by the corporation transferred in payment of bank stock purchased by it, the maker of the note could not controvert the rights of the corporation to purchase the stock.

[1] Union Water Co. *v.* Murphy's Flat Fluming Co., (1863) 22 Cal. 621. It was said by the court: "In numerous cases it has been held that a contract made by a corporation which is not authorized by its charter is not to be held void, and that a defendant sued thereon cannot refuse payment; but the legislature may inquire into any violation of the charter, or the government may institute suit for that purpose. The investigation must be in a direct proceeding instituted by the government for that purpose, and it cannot be had in a collateral way by individuals. Grand Gulf Bank *v.* Archer, 8 Smedes & M. 151, 173; Wade *v.* American Colonization Society, 7 Smedes & M. 663; Nevitt *v.* Bank of Port Gibson, 6 Smedes & M. 513: Chester Glass Co. *v.* Dewey, 16 Mass. 102; Moss *v.* Rossie L. M. Co., 5 Hill, 140; The Banks *v.* Poitiaux, 3 Rand. 142, 146; Vidal *v.* Girard's Exrs., 2 How. 191; Fleckner *v.* U. S. Bank, 8 Wheat. 355; Natoma W. & M. Co. *v.* Clarkin, 14 Cal. 552.

[2] Hough *v.* Cook Land Co., (1874) 73 Ill. 23.

[3] Ibid.: citing Banks *v.* Poitiaux, 3 Rand. 141; Barrow v. N. & C. T. Co., 9 Humph. 304; Chambers *v.* St. Louis, 29 Mo. 576; Attorney-General *v.* Tudor Ice Co., 104 Mass. 239; Whitman Mining Co. v. Baker, 3 Nev. 391; Hayward *v.* Davidson, 41 Ind. 212. That the state alone can raise objection to an *ultra vires* act, see Alexander *v.* Tolleston Club of Chicago, (1884) 110 Ill. 65; Barnes *v.* Suddard, 117 Ill. 237; People's Gas, etc., Co. *v.* Chicago Gas, etc., Co., 20 Bradw. 473.

self and other stockholders to restrain the action of the officers of the corporation from acts alleged to be *ultra vires* and illegal.[1] Where one buys land without knowledge of an outstanding equity, and his note, given for a portion of the price, secured by vendor's lien, is taken by a corporation to secure a loan, the owner of this outstanding equity cannot, in an action to enforce it, set up that the act of the corporation in taking the note was *ultra vires*.[2] A homestead loan association made a loan of money to two of its members for the use of a brewing company, the latter giving its deed of trust to the association to secure the loan. There was no fraud in the loan and nothing to mislead the parties in whose names the loan was made. The Illinois Supreme Court held that as the brewing company could not avoid its deed of trust under the plea of *ultra vires*, the parties to whom the loan was made were also estopped from availing of the defense, and that the deed of trust might be foreclosed as against them and other creditors of the brewing company having notice of the rights of the loan association.[3] It is no defense to a note given by one not a mem-

[1] Brown *v.* Duluth, M. & N. Ry. Co., (1893) 53 Fed. Rep. 889. See Heath *v.* Railway Co., 8 Blatchf. 347, 392, 410; Ramsey *v.* Erie Ry. Co., 7 Abb. Pr. (N. S.) 156; Hersey *v.* Veazie, 24 Me. 9.

[2] Taylor *v.* Callaway, (Tex. Civ. App. 1894) 27 S. W. Rep. 934. See, upon the question of estoppel to deny the power of a corporation to do an act, Bond *v.* Manufacturing Co., 82 Tex. 309; s. c., 18 S. W. Rep. 691, and authorities there cited, Bank *v.* Matthews, 98 U. S. 621; Smith *v.* White, (Tex. Civ. App.) 25 S.W. Rep. 809; Keys *v.* Association, (Tex. Civ. App.) 25 S. W. Rep. 809.

[3] Kadish *v.* Garden City Equitable Loan & Building Association, (1894) 151 Ill. 531. The court said: "There is * * * no prohibition in the statute against corporations becoming members of homestead loan associations for the purpose of borrowing money; neither is there any prohibition therein against loaning money for other than building purposes. In other words, the transactions were at most *ultra vires*, in the commonly understood sense of these words, and nothing more. As said in Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, cited with approval by this court in Darst *v.* Gale, 83 Ill. 141, 'the acts were not immoral in themselves or forbidden by any statute, neither *mala in se* or *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action. Such a contract as the law will not recognize or enforce, but applying the maxim *eo facto illicito non oritur actio*, leaves the parties as it found them.' It is also said in that case: 'When acts of corporations are spoken of as *ultra vires* it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the power conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the stockholders, that the affairs shall be managed and the funds

ber of a building association for money loaned him that the corporation exceeded its powers in loaning the money for which the note was given.[1] In a Michigan case, a manufacturing corporation, outside of the purposes for which it was incorporated, contracted with a party for a stated quantity of a manufactured article at a certain price, and then made a contract with another to manufacture the same and deliver it to him at such a price as left a profit to the corporation. This contract was deemed an *ultra vires* contract, as being a contract purely for a speculative purpose, and the manufacturer bringing an action against the corporation on a *quantum meruit* for goods delivered under the contract, the corporation sought to recoup for damages by reason of non-performance of the contract. The Supreme Court held that the plaintiff was not estopped from claiming that the contract was *ultra vires*.[2] The court further held that there being noth-

applied solely for carrying out the object for which the corporation was created. * * * It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith performed by the other party, and the corporation has had the full benefit of the performance of the contract. * * * The same rule holds *e converso*. If the other party has had the benefit of the contract fully performed by the corporation he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.'" See Benefit Association *v.* Blue, 120 Ill. 128; Bradley *v.* Ballard, 55 Ill. 415; 2 Beach on Priv. Corp. § 425 *et seq.*, for a full discussion of the subject; Carson City Sav. Bank *v.* Elevator Co., 90 Mich. 550; Holmes & Griggs Co. *v.* Metal Co., 127 N. Y. 252; s. c., 24 Am. St. Rep. 448.

[1] Poock *v.* Lafayette Building Association, (1880) 71 Ind. 357.

[2] Day *v.* Spiral Springs Buggy Co., (1885) 57 Mich. 146. COOLEY, Ch. J., said: "[The parties to this contract] must, therefore, be supposed to have understood that the contract in its inception was *ultra vires*. And the power on the part of such a corporation to enter into contracts of speculation being withheld on reasons of public policy for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the state, for general reasons, has withheld from it. Pennsylvania, etc., Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 319. Parties may also be estopped in some cases from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of COMSTOCK, Ch. J., in Parish *v.* Wheeler, 22 N. Y. 494, 508, 'the executed dealings of corporations must be allowed to stand for and against both the parties when the plainest rules of good faith so require.' But this is not such a case. The contract has only been performed in part. The defendant

ing of an immoral nature in this contract, the plaintiff was entitled to recover the value of her goods delivered on the contract to the corporation upon a *quantum meruit*.[1] If a corporation had no power to purchase a note and mortgage upon which it brings suit that fact should be pleaded as a defense.[2] Where one has made a contract with a corporation which is *ultra vires*, and has received the benefit of it, neither he nor those claiming under him are estopped from setting up the invalidity of the contract in defense of a suit to enforce it.[3]

§ 282. Financial arrangements contrary to public policy — rules governing proceedings on the part of the state, etc. —In proceedings on the part of the state to dissolve a corporation on account of its illegal or unwarranted acts, the state, as prosecutor, must show on the part of the corporation accused some sin against the law of its being which has produced or tends to produce injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm and menace the public welfare. When the transgression threatens the welfare of the people, they may summon the

has received a portion of the property bargained for, and we may justly assume that what has been received has passed into the hands of [the vendee of the corporation] and been paid for, so that the defendant will lose nothing but the anticipated profits on the remainder if the contract is not enforced in its favor. Those profits it had no right at any time to count upon, and in contemplation of law there can be no injustice in depriving it of profits which the law would not permit it to bargain for. No valid ground for estoppel is, therefore, found to exist in the case."

[1] Day *v.* Spiral Springs Buggy Co., (1885) 57 Mich. 146. The ruling the court considered sustained by Pratt *v.* Short, 79 N. Y. 437; Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, and Harriman *v.* Baptist Church, 63 Ga. 186, and cited as cases considering the principle involved, Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Thomas *v.* Railroad Co., 101 U. S. 71; In re Cork & Y. Ry. Co., L. R., 4 Ch. App. 748; In re National, etc., Society, L. R., 5 Ch. App. 309.

[2] Thomson *v.* Madison Building & Aid Association, (1885) 103 Ind. 279.

[3] Chambers *v.* Falkner, (1880) 65 Ala. 448. In Marion Savings Bank *v.* Dunkin, 54 Ala. 471, Justice Stone of the Alabama Supreme Court has said: "A party dealing with a corporation, in a matter not within the purview of its delegated powers, does not estop himself from setting up in defense the want of authority in the corporation to make the contract * * *. In such case the doctrine of estoppel cannot be held to apply without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation. Such contracts on the part of a corporation are *ultra vires* and void, and no right of action can spring out of them."

offender to answer for the abuse of its franchise or the violation of its corporate duty. These are the rules declared by the Court of Appeals of New York when considering the people's case against a corporation organized under the statutes of that state for the formation of manufacturing corporations which had surrendered its stock under an agreement with other similar corporations for the purpose of forming a "trust."[1] By the agreement entered into by the corporation immediately involved in the case with the others concerned, a "board," as it was called, was formed. The signers agreed to transfer all their shares of stock "to the names of the board as trustees, to be held by them and their successors as members of the board strictly as private tenants." This board, it was declared, "shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations." It was also authorized to transfer "to such persons as it may be desired to constitute trustees or directors or other officers of corporations so many of the shares as may be necessary for that purpose." The agreement provided that certificates should be issued by the "board" to the contracting parties in specified proportions in lieu of the capital stock; that each of the parties should maintain a separate organization and carry on and conduct its own business, paying over the profits to the board, "the aggregate or such amount as shall be designated for dividends," to be proportionally distributed by the board to the holders of the certificates. The board was prohibited from taking any action "which shall create liability by it or by its members," but there was a provision that the funds necessary to enable the board to make payments as specified "may be raised by mortgage to be made by the corporations, or any, either or all of them, upon their property." The number and amount of shares to be issued by the board was fixed with a proviso that they "may from time to time be increased or diminished by deeds executed by a majority in value of the certificate holders." Defendant's stock was transferred and certificates issued to its stockholders as provided for. The board elected officers and board of trustees of defendant, having transferred to each of them a share of the stock to enable him to hold the office. The effect of this transaction, as far as concerned defendant, was stated by the court to be "to divest it of the essential and vital

[1] People v. North River Sugar Refining Company, (1890) 121 N. Y. 582.

elements of its franchise by placing them in trust; to accept from the state the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn, and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power and so parted with the contract which the charter gave them and the state required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends, whatever may be its net earnings, and must incumber its property at the command of its master and for purposes wholly foreign to its own corporate interests and duties." "In all these respects," said the court, "it has wasted and perverted the privileges conferred by the charter, abused its powers and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the state had a right to expect and require. It has helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations. The state permits in many ways an aggregation of capital, but, mindful of the possible dangers to the people overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership."[1] Referring later in their opinion to this trust formed by the several corporations, having a capital stock double the value of the fair aggregate value of the rights and franchises of the companies absorbed at the outset and capable of an elastic and irresponsible increase, the court said: "And here, I think, we gain a definite view of the injurious tendencies developed by its organization and operation and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the

[1] Ibid.; citing N. Y. & S. C. Co. *v.* Meredith, 1 Wall. 29; Whittenton F. Bank, 7 Wend. 412; Clearwater *v.* Mills *v.* Upton, 10 Gray, 596.

public benefit, and conduct which destroys their normal functions and maims and cripples their separate activity and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest, and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination, which stands outside of the hand of the state, which dominates the range of an entire industry and puts upon the market a capital stock, proudly defiant of actual values, and capable of an unlimited expansion."[1] If the business of a corporation is threatened with competition, it is not illegal or immoral if it can persuade its competitor to abandon an enterprise in which both cannot succeed upon the basis of some proper consideration therefor.[2] In an Ohio case the Supreme Court said: "Where all or a majority of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company in the same manner as if it had been a formal resolution

[1] People *v.* North River Sugar Refining Co., (1890), 121 N. Y. 582, holding that the corporation had violated its charter and failed in the performance of its corporate duties, and in respects so material and important as to justify a judgment of dissolution. In Leslie *v.* Lorillard, (1888) 110 N. Y. 519, 533, the New York Court of Appeals said: "Corporations are great engines for the promotion of the public convenience and for the development of public wealth, and so long as they are conducted for the purposes for which organized, they are a public benefit; but if all were to engage without supervision in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to that industry in which they are engaged, they become a public menace, against which public policy and statutes design protection. When, therefore, the provisions of agreements in restraint of competition tend beyond measures for self-protection and threaten the public good in a distinctly appreciable manner, they should not be sustained. The apprehension of danger to the public interests, however, should rest on evident grounds, and courts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations, unless their conduct, in some tangible form, threatens the welfare of the public." See on this subject Shepaug Voting Trust Cases, (1890) 60 Conn. 553; s. c., 24 Atl. Rep. 32.

[2] Oakes *v.* Cattaraugus Water Company, (1894) 143 N. Y. 430; s. c., 38 N. E. Rep. 461; 62 N. Y. St. Repr. 445. See, also, Leslie *v.* Lorillard, (1888) 110 N. Y. 519.

of its board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation, and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*."[1] THAYER, J., in the United States Circuit Court for the eastern district of Missouri, refused an injunction to restrain a Missouri corporation from violating an agreement it had entered into not to engage in the business for which it was organized for a period of twenty-five years upon the ground that the agreement was void. He referred to the trust agreement which had been signed by this and other corporations in the same line of business, its various provisions, and held that this corporation exceeded its powers in signing and becoming a party to the trust agreement.[2] These are rules declared by the New Jersey Court of Chancery: The corporate acts of directors, if they are within the powers of the corporation, and in furtherance of its purposes are not unlawful or against good morals and are done in good faith and in the exercise of an honest judgment, cannot be questioned by individual stockholders in judicial proceedings. Contracts made by corporations, which appear to be designed to promote their legitimate and profitable operation, will be presumed by the courts, as a general rule, to be within

[1] State ex rel. *v.* Standard Oil Company, (1892) 49 Ohio St. 137.

[2] In American Preservers' Trust *v.* Taylor Manufg. Co., (1891) 46 Fed. Rep. 152, it was said by the court: "By [signing and becoming a party to this agreement defendant] united, with the other corporations and individuals who signed the agreement, in creating a partnership or joint-stock concern, and in furtherance of that enterprise it undertook to appoint agents to manage the concern in its behalf, and to vest such agents with authority to buy and lease property in all parts of the United States, to obtain and exercise control over other corporations by acquiring their stock, and with power likewise to issue negotiable securities without limit, and to declare dividends thereon. In all these respects, I must conclude that the defendant corporation, by executing the trust agreement, undertook to exercise powers to which it could lay no reasonable claim by virtue of the law under which it is organized, and from which all of its powers are derived." Citing People *v.* North River Sugar Refining Co., (1890) 121 N. Y. 582; s. c., 24 N. E. Rep. 834; Mallory *v.* Hanaur Oil Works, (1888) 86 Tenn. 598; s. c., 8 S. W. Rep. 396; State *v.* Nebraska Distilling Co., (1890) 29 Neb. 700; s. c., 46 N. W. Rep. 155; Whittenton Mills *v.* Upton, 10 Gray, 596.

the limits of their power, and if the validity of the contracts be assailed, the assailant will be required to assume the burden of demonstrating their invalidity. Corporations organized under the general law of New Jersey are vested with the powers conferred by the general act, and those contemplated by the certificate, and such incidental powers, with respect of the general and special powers, as are necessary in the sense of convenient, reasonable and proper. While the general act permits incorporation for "any lawful business or purpose whatsoever," and the law gives all necessary powers thereto, it does not recognize as embraced therein powers to do those things which would deprive the corporation of its ability to carry out the objects for which it was formed, or discharge any duties which it might under its charter owe to the public, or which are contrary to the policy of the law.[1] The doctrine of *ultra vires* ought to be reasonably, and not unreasonably, understood and upheld, and whatever may be fairly regarded as incidental to and consequential upon those things which are authorized by the charter of a corporation ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.[2] Contracts by a corporation which impose an unreasonable restraint upon the exercise of its business are void, but contracts in reasonable restraint of its business are valid. The test to be applied in determining the reasonableness of the restraint imposed by the contract is to consider whether it is only such as is necessary to afford a fair protection to the interest of the corporation in favor of which it is given, and not so large as to interfere with the interest of the public.[3] The Illinois Supreme Court, in the Chicago Gas Trust case, declared these rules as to corporations: Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication, and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their

[1] Ellerman *v.* Chicago Junction Railways & Union Stock Yards Company, (1891) 49 N. J. Eq. 217.

[2] Ibid.

[3] Ibid.; in which case, under the test stated in the text, the chancellor held that a covenant by parties selling the plant and business of stock yards, not to engage in the business for a certain number of years, nor in the place where they were located or within 200 miles thereof, was not unreasonable, and not an illegal restraint of trade. For illustration of contract between corporations not contrary to public policy, see Live Stock Assn. of New York *v.* Levy, (1886) 54 N. Y. Super. Ct. 32.

creation.[1] An incidental power is one that is directly and immediately appropriate to the execution of the specific powers granted, and not one that has a slight or remote relation to it.[2] The court held that the Chicago Gas Trust Company, being a corporation formed under the General Incorporation Law of that state for the purpose of erecting and operating gas works and the manufacture and sale of gas, had no power to purchase and hold or sell shares of stock in other gas companies as incident to the purpose for which it was formed, even though such power was specified in its articles of incorporation. This corporation was incorporated under the general law for two purposes. These were expressed in its articles of association in these words: *First*, for the purpose of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in this state; and, *second*, "to purchase and hold or sell the capital stock, or purchase or lease, or operate the property, plant, good will, rights and franchises of any gas works or gas company or companies, or any electric company or companies, in Chicago or elsewhere, etc." It sought to exercise the powers claimed under the second clause only, and for that purpose bought a majority of the shares of all the gas companies in Chicago, being four in number, whereby it might have the control of all the gas companies in the city and thus destroy competition and monopolize the gas business. The Supreme Court held that the corporation so formed was not for a lawful purpose and that all acts done by it toward the accomplishment of such object were illegal and void.[3] A stockholder, in a suit which he is only permitted to prosecute in behalf of the corporation and for its benefit, cannot raise the question whether or not the defendant corporation in the suit could acquire and lawfully exercise all the powers declared in its certificate of incorporation, especially whether it could lawfully own the stock of another corporation. Such a question can only be presented for judicial determination by the attorney-general on behalf of the state.[4]

[1] Citing C., P. & S. W. R. R. Co. *v.* Marseilles, 84 Ill. 643; Chicago Gas Light Co. *v.* People's Gas Light Co., 121 Ill. 530.

[2] People ex rel. Peabody *v.* Chicago Gas Trust Co., (1889) 130 Ill. 268; s. c., 22 N. E. Rep. 798; citing on the last point Hood *v.* N. Y. & N. H. R. R. Co., 22 Conn. 1; Franklin Co. *v.* Lewiston Savings Institution, 68 Me. 43.

[3] People ex rel. Peabody *v.* Chicago Gas Trust Co., (1889) 130 Ill. 268; s. c., 22 N. E. Rep. 798.

[4] Willoughby *v.* Chicago Junction Railways & Union Stock Yards Co., (1892) 50 N. J. Eq. 656.

CHAPTER IX.

BANKS AND BANKING.

§ 283. **Powers of banks generally.**— A bank, upon which general banking powers have been conferred, may borrow money without any more specific authority.[1] A national bank has power to borrow money on negotiable paper, made and indorsed for its accommodation.[2] As incident to its power to loan money,

[1] Ringling *v.* Kohn, (1878) 6 Mo. App. 333; Donnell *v.* Lewis Co. Savings Bank, 80 Mo. 165.

[2] Bank *v.* Sullivan, 11 W. N. C. (Pa.) 362. In a leading New York case (Curtis *v.* Leavitt, (1857) 15 N. Y. 9, 255, 256), Selden, J., states the contention of the receiver's counsel as follows: "[They] take the broad ground that banking corporations cannot borrow money, or, at least, that they cannot borrow to supply the place of capital. They contend that it is the business of banks to lend money, not to borrow; that borrowing does not come within the scope of legitimate banking, and is in its nature a power which corporations created for banking purposes cannot properly exercise." He then said: "This position is not supported by any direct authority, and a careful consideration of the nature of banking, together with an examination of its history, has satisfied me that it cannot be sustained. It is not in harmony with the present practice or the past history of banks. Banking for profit is based primarily upon the idea of borrowing, without interest, the various sums which the individuals of a commercial community must necessarily keep on hand unemployed, to meet any sudden emergency, and reloaning the money, or the greater part of it, upon interest. It may be said that banks may borrow, that is, receive deposits without interest, but cannot borrow upon interest. This, too, is untenable. One of the soundest banking systems known to the age, viz., the Scotch, is sustained to a great ex-

a bank may take as security a crop of cotton, and ship the same to a factor, to be sold to reimburse the loan.[1] A bank, authorized by its charter to deal in bills of exchange and discount notes, made negotiable and payable at the bank, with two or more good and sufficient sureties, may, under this power, undertake to collect bills of exchange in other places.[2] Under the National Banking Association Act, the powers which national banks may exercise are limited to those expressly granted and those necessarily incidental.[3] They would have no absolute right to retain bonds coming into their possession by purchase, under contracts which they were without legal authority to make.[4] National banks may exercise all such incidental powers as may be necessary for discounting and negotiating promissory notes, drafts, bills of exchange, etc., which they are authorized to do.[5] It is not beyond the powers of a national bank to purchase a draft

tent by sums borrowed at a rate of interest below that charged by the banks. Edin. Ency. 224, tit. Banks; Lawson's Hist. of Banking, 419. The committee appointed by the House of Lords in England, in 1826, to inquire into the Irish and Scotch systems of banking, reported that it was 'proved by evidence and by the documents that the banks of Scotland, whether chartered joint-stock companies or private establishments, have, for more than a century, exhibited a stability which the committee believe unexampled in the history of banking.' Lawson's Hist. of Banking, 434. The country bankers of England also allow interest on the balances of money in their hands. McCulloch's Notes to Smith's Wealth of Nations, 489, title, Money, Edin. ed.; Lawson's Hist. of Banking, 273. Another writer, speaking of the practice of borrowing by the Scotch banks, says: 'This is in fact a part of the proper business of a bank. A banker is a dealer in capital, an intermediate party between the borrower and the lender; he borrows of one party and lends to another, and the difference between the terms at which he borrows and those at which he lends is the source of his profit.' Gilbert on Banking, 52. It can scarcely be said, in view of these precedents and authorities, that borrowing money, even to be used as capital, is not within the range of the business of banking. The position, therefore, that the acts of the banking company in issuing the paper in question were *ultra vires* cannot be sustained on the ground that borrowing is no part of legitimate banking, but must rest on that branch of the argument which is drawn from the terms of the General Banking Law itself. It is a question, not of appropriate banking, but of corporate power."

[1] Deloach *v.* Jones, 18 La. 447.

[2] Branch Bank at Montgomery *v.* Knox, (1840) 1 Ala. 148. As to the power of banks to issue post notes, see Campbell *v.* Mississippi Union Bank, 6 How. (Miss.) 625.

[3] Logan Bank *v.* Townsend, 139 U. S. 67.

[4] Ibid.

[5] Shinkle *v.* First National Bank of Ripley, (1872) 22 Ohio St. 516.

with a bill of lading attached.[1] The discount of notes by a corporation authorized by statute to invest its capital in notes and to purchase and hold securities in payment of the debts due to it is not *ultra vires*.[2] A banking institution, having power to lend deposits on the public stock of the state or the United States on bond and mortgages, or "upon any other securities which should be deemed, by the board of directors, ample," has been held not to be limited to the securities mentioned, and empowered to discount commercial paper.[3] A national bank, having coin in pledge, may sell and assign its special property therein.[4] A bank, to save itself from loss, under its general powers, may take an assignment of an account due its debtor.[5] A national bank is authorized to buy the checks of individuals or other banks, when payable to bearer or to order.[6] A bank may transfer a good title to checks received, as cash, from a depositor, and so credited to his account, in payment of a debt, and the transferee may recover upon them against the drawers.[7] A bank, with which an owner of a bond and mortgage had agreed to convert it into money for the benefit of the bank, and upon its assignment for that purpose, had guaranteed its collection, was held bound by the guaranty, although the bond was not assigned to the bank, and reassigned by it.[8] A national bank may take, hold and enforce a chattel mortgage for a previously contracted debt.[9] It is within the powers conferred by congress upon national banking associations to receive from its customers United States bonds of one class to be converted into bonds of another class.[10] A bank, without an express undertaking on its part, will not be bound, by law, to protect from forfeiture, stock deposited with it as security for a debt, by payment of installments in arrear.[11] The Minnesota Supreme Court has held that there is no reason

[1] Union National Bank *v.* Rowan, 23 S. C. 342.

[2] Bright *v.* Banking Co., 3 Pennypacker (Pa.), 478.

[3] Detroit Savings Bank *v.* Truesdail, 38 Mich. 430.

[4] Merchants' Bank *v.* State Bank, 10 Wall. 604.

[5] Bank of North America *v.* Tamblyn, (1879) 7 Mo. App. 571.

[6] Rochester Bank *v.* Harris, (1871) 108 Mass. 514.

[7] Metropolitan National Bank *v.* Loyd, (1881) 25 Hun, 101.

[8] Talman *v.* Rochester City Bank, (1854) 18 Barb. 123.

[9] Spafford *v.* First National Bank of Tama City, 37 Iowa, 181.

[10] Leach *v.* Hale, (1870) 31 Iowa, 69.

[11] Railroad Bank *v.* Douglas, 2 Speer (S. C.), 329.

why a national bank may not, for convenience and a proper purpose, hold and own notes and mortgages through the medium of a trustee.[1]

§ 284. The guaranty of commercial paper by a bank.— The Supreme Court of Nebraska has lately held that while a national bank may not lend its credit for the accommodation of others, still it may guarantee the payment of commercial paper as incidental to the exercise of its power to buy and sell the same.[2] The Nebraska court accepted as the proper statement of the law upon this subject the following declaration by Mr. Justice SWAYNE, speaking for the United States Supreme Court, in a leading case before that court: "The National Bank Act,[3] gives every bank created under it the right to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, *by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt*, by receiving deposits, etc. Nothing in the act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence. The doctrine of *ultra vires* has no application in cases like this. Merchants' Bank *v.* State Bank, 10 Wall. 604. All the parties engaged in the transaction, and the privies, were agents of the defendant. If there were any defects of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as

[1] First National Bank of Memphis *v.* Kidd, 20 Minn. 234.

[2] Thomas *v.* City National Bank of Hastings, (1894) 40 Neb. 501; s. c., 58 N. W. Rep. 943.

[3] Rev. St. U. S. § 5136.

would have been the most formal words. These facts conclude the defendant from resisting the demand of the plaintiff. * * * A different result would be a reproach to our jurisprudence."[1]

§ 285. **Acts ultra vires a bank.**— A bank discounting a note, knowing the intention of the party offering it to be that the proceeds of the discounting should be applied to the discharge of a particular note held by the bank, cannot apply the proceeds to the discharge of any other note.[2] A bank cannot bind itself by an accommodation indorsement.[3] National banks have no legal power to guarantee a contract between other persons for the delivery of building materials.[4] The power of a national bank to give a guaranty against liability or loss to sureties on paper discounted by it, when the effect of such guaranty would be to make the paper that of one party only, secured by mortgages on real estate, has been questioned in a Michigan case.[5] A national bank cannot act as broker for the sale of state bonds on commission.[6] A national bank has no power to sell railroad bonds for a customer on commission.[7] A bank has no authority to become surety on the bond of a public officer.[8] A bank will not be justified in refusing to reassign collateral which it holds for the payment of certain notes because the pledgee may be indebted to it upon an entirely distinct cause of action.[9] A bank cannot apply the proceeds of a note tendered to it for discount to the

[1] People's Bank v. Manufacturers' National Bank, 101 U. S. 181, in which case the facts were that one Pickett made his notes for $50,000, payable to his own order, indorsed them, and delivered them to the national bank to be negotiated to the plaintiff. The vice-president of the national bank, with the knowledge and consent of the president and cashier, but without any authority from the board of directors, or from a majority of them as individuals, transmitted the notes to the plaintiff, with a written guaranty signed by himself. The plaintiff's account was debited with $50,000 on account of the notes. At the same time Pickett's paper held by the defendant was canceled to the same amount.

[2] Bank of Alexandria v. Saunders, 2 Cranch Cir. Ct. 183.

[3] Bank of Genesee v. Patchin Bank, 13 N. Y. 309.

[4] Norton v. Derry National Bank, 61 N. H. 589.

[5] First National Bank v. Bennett, 33 Mich. 520.

[6] Smith v. Bank, 1 Walk. (Pa.) 318.

[7] Weckler v. First National Bank of Hagerstown, 42 Md. 581.

[8] Miners' Bank Estate, 13 W. N. C. (Pa.) 370.

[9] McIntire v. Blakeley, (Pa.) 12 Atl. Rep. 325.

payment of the maker's indorsement on another note without his consent.[1] In an action of the owner of a lot which had been assessed by a city for benefits and afterwards sold upon a judgment, and a certificate of sale given to the city, which it assigned to another party, who in turn assigned it to a national bank, against the city and bank to determine their adverse claims, the plaintiff made the point that the bank, being a national bank, had no authority to purchase the certificate. The Supreme Court of Minnesota considered it well settled that no one but the government could raise that question.[2] The United States Circuit Court for the eastern district of Washington, in an action upon a note against a national bank as guarantor, has held that United States Revised Statutes, section 5202, providing that national banks shall not contract liabilities in excess of their paid-up capital stock, except upon notes of circulation, accounts for deposits, etc., did not intend that such items of liability should be excluded in determining whether the indebtedness of a bank exceeded its paid-up capital stock at the time it incurred a liability as guarantor. And that in an action against the bank and its receiver on such a note as here sued on, the defendants might avail themselves of the defense that the note was executed in violation of the section of the Revised Statutes above mentioned, as the note being void as to the bank, it was not estopped to set up the defense in question.[3]

§ 286. Taking mortgage on and purchase of real estate. — A national bank cannot take a mortgage upon real estate as a security for a debt concurrently created, or for future advances.[4] It is competent for a national bank to purchase a note in favor of a third party, and thereby acquire incidentally a mortgage on

[1] Parry *v.* Highley, 8 Pa. Co. Ct. Rep. 584.

[2] Hennessy *v.* City of St. Paul, (1893) 54 Minn. 219; s. c., 55 N. W. Rep. 1123; citing Merchants' National Bank *v.* Hanson, 33 Minn. 40; s. c., 21 N. W. Rep. 849; National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99; Fortier *v.* New Orleans Bank, 112 U. S. 451; s. c., 5 Sup. Ct. Rep. 234.

[3] Weber *v.* Spokane Nat. Bank, (1892) 50 Fed. Rep. 735.

[4] Kansas Valley National Bank *v.* Rowell, (1873) 2 Dill. 371. As to the lack of power of a national bank to loan its money on real estate security, see Matthews *v.* Skinker, (1876) 62 Mo. 329; Warner *v.* DeWitt County National Bank, 4 Bradw. (Ill.) 305; Winton *v.* Little, 94 Pa. St. 64, overruling Fowler *v.* Scully, 72 Pa. St. 456, and Woods *v.* People's Bank, 83 Pa. St. 57; National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99; Fortier *v.* New

land which may have been given to secure it.[1] Where several debts due a national bank are consolidated into one, and a new note given, the bank would not be acting *ultra vires* in taking a mortgage on real estate to secure the consolidated note.[2] A national bank extended the time of payment of indebtedness secured by a mortgage on real estate at a usurious rate of interest, and took for it notes and a mortgage, made by the debtor to a third person, the notes being indorsed by the latter. The Supreme Court of Ohio held that the usury only avoided the interest, and that to the extent the debt was valid, the mortgage was on *bona fide* security, and that the bank, by becoming the owner of the notes, acquired the equity in the mortgage.[3] A mortgage upon real estate given to an officer of a national bank, at the time of a loan by the bank, to secure its payment, being, in effect, the same as if made to the bank, has been held to be void and not enforceable by the courts, under the prohibition in the National Banking Law, of loans of money on real estate security.[4] The prohibition in the law against national banks taking security for loans on real estate, does not, however, extend to mortgages made in good faith by way of security for debts previously contracted, and banks may take the assignment of notes, secured by trust deed on real estate, as collateral security for pre-existing debts due the banks.[5] A national banking association may avail itself of a security on real estate given to one personally liable on a loan made by the association.[6] The Minnesota Supreme Court has

Orleans National Bank, 112 U. S. 439. For an illustration of a note and mortgage on real property which it was in the power of a national banking association to take, see Ornn *v.* Merchants' National Bank, (1876) 16 Kans. 341.

[1] Oldham *v.* Bank, 85 N. C. 240.

[2] Ibid.

[3] Allen *v.* First National Bank Xenia, (1872) 23 Ohio St. 97.

[4] Fridley *v.* Bowen, (1877) 87 Ill. 151. The court said: "The provision [of the National Banking Law] declaring upon what security such associations may make current loans, viz.: Upon 'personal security,' and the subsequent inhibition that no mortgage shall be taken on real estate except by way of security for debts previously contracted, must be understood to forbid absolutely such associations making loans upon security afforded by mortgages on real estate." The court cited as sanctioning its views: Fowler *v.* Scully, 72 Pa. St. 456; First National Bank *v.* National Bank, 92 U. S. 122; Matthews *v.* Skinker, 62 Mo. 329.

[5] Worcester National Bank *v.* Cheeney, (1878) 87 Ill. 602; Gaar *v.* First National Bank of Centralia, 20 Bradw. (Ill.) 611.

[6] First National Bank *v.* Haire, 36 Iowa, 443. As to a national bank's right to take title to real estate in dis-

held that, in the absence of affirmative evidence of some contravention of the National Banking Association Act, a national bank might lawfully purchase, hold and convey real estate.[1] The New Jersey Supreme Court has held that a national bank empowered by its charter "to provide the real estate" necessary for its immediate accommodation in the transaction of its business, cannot interpose the defense of *ultra vires* to a contract made by it to secure free entrance of light and air into its banking house.[2] Where a national bank discounts a note secured by a deed of trust on real estate, the security passes to the bank and may be enforced by it.[3] Speculation in real estate, by national banks, under the pretense of obtaining satisfaction of a previous debt, is forbidden by law. Such a bank, however, may acquire title to real estate, even though incumbered, if it is honestly done, for the purpose of securing a debt due to it. This may be done by taking a conveyance directly or by sale under process of law.[4] Thus, where a firm of merchants were indebted to a bank upon drafts drawn upon them and accepted, discounted by the bank, in its regular course of business, to a certain amount, and secured by the transfer of a note of a third party for a larger sum, this note secured by a deed of trust upon real estate subject to other liens, and the third party made a deed of the property to the bank in payment of the sum due from him, the bank agreeing to discharge the other liens upon the same, the transaction was held not to be forbidden by the law regulating such banks.[5] A mortgage upon real property taken by a national banking association as security will not be void. A judgment of ouster and dissolution in a proper proceeding is the punishment for taking such a mortgage. Private persons cannot question the validity of the act.[6] A national bank may purchase real

charge of indebtedness previously contracted to it, see Turner *v.* First National Bank, (1881) 78 Ind. 19. As to a mortgage given to a national bank and assigned to a third party being good, see Lacey *v.* Central National Bank, 4 Neb. 179. As to foreclosure of a mortgage by a national bank, see Scofield *v.* State National Bank, 9 Neb. 323.

[1] First National Bank of Memphis *v.* Kidd, 20 Minn. 234.

[2] Trustees of First Presbyterian Church in Newark *v.* National State Bank of Newark, (N. J. 1894) 29 Atl. Rep. 320.

[3] Thornton *v.* National Exchange Bank, (1879) 71 Mo. 221.

[4] Mapes *v.* Scott, (1878) 88 Ill. 352.

[5] Ibid.

[6] First National Bank *v.* Elmore, 52 Iowa, 541; Streeter *v.* First National Bank, 53 Iowa, 177. As to the power of a national bank to purchase real

estate at a judicial sale to satisfy a judgment and decree rendered in a proceeding to foreclose a mortgage on land on which the bank held a second mortgage lien, and to which foreclosure proceeding it was made a party.[1] These banks have authority to hold and convey such real estate as they may purchase at sales under judgments, decrees or mortgages held by them to secure debts due them.[2] The title of a national bank to land which was mortgaged to it, and purchased at judgment sale, would not be invalidated as to the mortgaged property, by the fact that at the sale it purchased other property which it may not have been authorized to acquire.[3]

§ 287. **Purchasing notes.**—The Court of Appeals of Maryland has held that under the National Banking Association Act a bank formed under it has no authority to use its funds in purchasing notes and can acquire no title to notes by the purchase of them.[4] The ruling of the Minnesota Supreme Court on this subject has been that the purchase of promissory notes by a bank authorized simply to discount notes was *ultra vires* and that the purchase would confer no title.[5] In a later case this same court held that national banks have no power to deal in promissory notes, as choses in action, for the purpose of private gain and profit alone, and limited their power to acquire title to such notes

estate necessary to secure a debt to it, although in excess of the debt, see Upton *v.* South Reading Bank, (1876) 120 Mass. 153.

[1] Heath *v.* Second National Bank, (1880) 70 Ind. 106.

[2] Wherry *v.* Hale, (1882) 77 Mo. 20. As to a national bank purchasing real estate in satisfaction of a debt due it, see Libby *v.* Union National Bank, 99 Ill. 622.

[3] Reynolds *v.* Crawfordsville Bank, 112 U. S. 405. As to a national bank, lawfully holding a mortgage on real estate, purchasing a prior mortgage on the same land to protect its interest, see Holmes *v.* Boyd, (1883) 90 Ind. 332.

[4] Lazear *v.* National Union Bank of Maryland, at Baltimore, (1879) 52 Md. 78.

[5] Farmers & Mechanics' Bank *v.* Baldwin, 23 Minn. 198. The court said: "The power to carry on the business of banking by discounting notes, bills and other evidences of debt, is only an authority to loan money thereon, with the right to deduct the legal rate of interest in advance. This right can be fully enjoyed without the possession of the unrestricted power of buying and dealing in such securities as choses in action and personal property. Though, as argued by plaintiff, the bank acquires a title to discount paper, and, hence, may, in a certain sense, be said to have purchased it, yet it is a purchase by discount, which is permitted, and does not involve the exercise of a power of purchase in any other way than by discount."

to discounting them.[1] In an Ohio case it was held that the power given to the corporation by a statute of the state of New York "to carry on the business of banking by discounting bills, notes and other evidences of debt," was not a power to buy promissory notes but to loan money upon the paper described, and that a transaction of that character was within the usury laws of that state.[2] Under the power given savings institutions to discount negotiable notes in Kansas, they have been held to have the power of purchasing such notes.[3] In a comparatively late

[1] First National Bank of Rochester *v.* Pierson, 24 Minn. 140.

[2] Bank *v.* Baker, 15 Ohio St. 68. In Fleckner *v.* Bank, 8 Wheat. 338, it appeared that the plaintiff purchased from another bank a note which had been passed to it through several parties from the original holder. The bank was forbidden to deal in any thing, except bills of exchange, gold or silver, or take more than six per cent upon its loans or discounts. It was claimed by defendant that the purchase of the note was *ultra vires*, but the court held that it was not, and that such purchase was but a discount. STORY, J., speaking for the court, says: "But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of debt which arises from the loan? If it is to discount, must there not be some chose in action, cr written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidence of debt, payable at a future day, which are transferred to the bank." In the case of Smith *v.* Bank, 26 Ohio St. 141, the defense was that the bank (a national bank) purchased the paper of the payees, and that it had no authority to make such purchase. Upon this question, the court says: "It does not state that the purchase was made at a usurious rate of discount, but it avers that under the act of congress to provide a national currency, under which the bank was incorporated, it had no authority to purchase the bill. It seems to be the idea of counsel making the objection that negotiable paper, perfect and available in the hands of the holder, is not the subject of purchase by a national bank at any rate of discount. This view we think entirely erroneous. We see nothing in the act of congress, nor in reason, why a borrower may not obtain the discount, by a bank, of one of the existing notes and bills of others, of which he is the holder, as well as of his own paper, made directly to the bank. It is true that as between natural persons, the purchase of such paper, when made in good faith, and not as a disguise for a loan, is not subject to the usury laws, but it is otherwise as to a bank. In the business of banking, the purchasing and discounting of paper is only 'a mode of loaning money.'"

[3] Pape *v.* Capitol Bank of Topeka, (1878) 20 Kans. 440. BREWER, J., speaking for the court, said: "The power granted is the naked power of discounting, and the term 'discounting' includes purchase as well as loan. 'To discount' signifies the act of buy-

case an action by a bank organized under the laws of New Hampshire, engaged in doing a general banking business, upon a note, the Supreme Court of Missouri sustained the power of the bank under its charter, nothing appearing to the contrary therefrom, to buy outright the notes sued on; at the same time they held that it had no right to purchase them at a greater rate of discount than the rate of interest it might lawfully charge for the loan of that money.[1] In a recent Massachusetts case, an action by a national bank against the indorser of a promissory note, to whose order the note was payable, its right to recover was denied on the ground that it had no title to the note. It was argued that under the statutes of the United States national banks could not buy or sell promissory notes, and that, inasmuch as the bank obtained the note by purchase, it had no right to hold or collect it. Knowlton, J., speaking for the Supreme Court of Judicature, declared the law, as they considered it upon these contentions, as follows: "On the question whether a national bank can buy promissory notes in the market as a natural person can, there is a conflict of authority. Its power to do so, if it has any, is conferred by the United States Revised Statutes, section 1536 (13

ing a bill of exchange or promissory note for a less sum than that which, upon its face, is payable. It is, also, undeniably clear that the term 'discount,' when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied, either to loans or sales by way of discount, when a sum is counted off or taken from the face or amount of the paper at the time the money is advanced upon it, whether that sum is taken for interest upon a loan, or as the price agreed upon a sale." See, also, Tracy *v.* Talmage, 18 Barb. 462; Bank *v.* Sherburne, 14 Ill. App. 566.

[1] Salmon Falls Bank *v.* Leyser, (Mo. 1893) 22 S. W. Rep. 504. The court distinguished Bank *v.* Simpson, 1 Mo. 184, in these words: "It is true that it is held by this court in [that case] that the plaintiff, a corporation created under the laws of the state of Illinois, could not under its charter so deal in promissory notes as to become the purchaser thereof. But its charter, the court says, 'restrains the bank generally from dealing or trading except in bills of exchange, gold or silver, or in the sale of goods pledged for money lent or which shall be the proceed of land.' It will be observed that the decision in this case is based altogether upon the restrictions in plaintiff's charter, which was before the court, and incorporated in the bill of exceptions. No such restrictions are shown to have been placed upon plaintiff's powers as a banking institution." That a national bank cannot rescind a contract of purchase of a note on the ground that it had no power to purchase and recover back the money paid for it, see Attleborough Bank *v.* Rogers, (1878) 125 Mass. 339.

U. S. Sts. at Large, 101), which authorizes national banks to discount and negotiate 'promissory notes, drafts, bills of exchange and other evidences of debt,' etc. It has sometimes been held that the right to discount and negotiate notes, etc., goes no further than to authorize the taking of them in return for a loan of money made on the strength of the promises contained in them.[1] By other courts it has been held that the right to 'discount and negotiate' includes the right to buy.[2] If we assume, in favor of the defendant, that national banks are not authorized under the law to go into the market and buy promissory notes from those who are selling them only as a commodity, there are several reasons why this defense cannot prevail. In the first place, if such a purchase is *ultra vires*, it is an ordinary contract; it is not made penal nor expressly forbidden, and the maker or indorser cannot defend on the ground that the bank has obtained no title. The violation of law can be availed of only in proceedings against a national bank in the interest of the public to deprive it of its charter. This has been decided by the Supreme Court of the United States.[3] Secondly, the evidence in this case would well warrant, if not require, a finding by the court that the transaction was a discounting of a note for the defendant within the meaning of the statute. The note was in the hands of the indorser's agent, who consulted the indorser about the rate of interest to be allowed before giving the note to the plaintiff. The plaintiff's money was paid to indorser, less the agent's commission. The transaction would have been no different in substance if the defendant, who held the note as indorser, had carried it to the plaintiff's [plaintiff ?] bank and had there made in person the contract which he made through the agent. If he had done that the transaction clearly would have been a negotiation of a loan and a discounting of a promissory note.[4] Thirdly, it

[1] Lazear *v.* National Union Bank, 52 Md. 78, 124; Farmers & Mechanics' Bank *v.* Baldwin, 23 Minn. 198; First National Bank *v.* Pierson, 24 Minn. 140; Niagara County Bank *v.* Baker, 15 Ohio St. 69.

[2] Citing Smith *v.* Exchange Bank, 26 Ohio St. 141; Pape *v.* Capitol Bank of Topeka, 20 Kans. 440. See, also, First National Bank *v.* Harris, 108 Mass. 514, 516; National Pemberton Bank *v.* Porter, 125 Mass. 333; Atlas National Bank *v.* Savery, 127 Mass. 75, 77.

[3] Citing National Bank *v.* Matthews, 98 U. S. 621, and cases cited; National Bank *v.* Whitney, 103 U. S. 99; Merchants' National Bank *v.* Hanson, 33 Minn. 40; Slater Woolen Co. *v* Lamb, 143 Mass. 420.

[4] Citing Lazear v. National Union Bank, 52 Md. 124; Farmers & Mechanics' Bank *v.* Baldwin, 23 Minn.

has been held in this commonwealth, in analogy with the above-cited decisions of the Supreme Court of the United States, but on somewhat different grounds, that, even if a national bank does not get the legal title to a promissory note bought in the market, it may maintain a suit as the holder, and the maker and indorsers cannot be relieved from their contracts to pay the amount promised in the writing."[1]

§ 288. **Purchasing stock of corporations.**— A national bank, by way of compromising a claim alleged to be due, and for the purpose of averting an apprehended loss on account of such claim, has the right to acquire stock to be again turned into money, but has no right to purchase or acquire such stock either for speculation or investment.[2] Such a bank not being expressly prohibited from becoming a stockholder in another corporation, may take shares in another corporation as collateral security for a loan made by it, or in satisfaction for a loan for which the stock may have been pledged to it as security.[3] The United States Supreme Court has also held that stocks of other corporations may be taken by a national bank with a view to sell them at a profit in adjusting and compromising claims growing out of legitimate banking transactions.[4] The Nebraska Supreme Court, in a recent case involving the power of a bank to purchase the stock of an insurance corporation through its cashier, has, after a review of leading cases bearing upon the subject of corporations purchasing or acquiring stock in others, summed up the law as follows: "It is doubtless true that the bank could legally take the stock of another corporation as security for a debt previously contracted. Possibly it might make a loan on the strength of the stock as security at the time. On this point the authorities are not in harmony, and as it is not material here we do not decide it. An emergency might arise when a bank's board of directors would be justified in taking stock of another corporation in settlement, or adjustment, or compromise of a doubtful claim or debt,

198; First National Bank *v.* Pierson, 24 Minn. 140.

[1] Prescott National Bank *v.* Butler, (1893) 157 Mass., 548, 549, 550; citing Atlas National Bank *v.* Savery, 127 Mass. 75, 77; National Pemberton Bank *v.* Porter, 125 Mass. 333.

[2] First National Bank of Charlotte *v.* National Exchange Bank of Baltimore, 39 Md. 600.

[3] Kennedy *v.* California Savings Bank, (1894) 101 Cal. 495.

[4] First National Bank *v.* National Exchange Bank, 92 U. S. 122.

acting in the honest belief that only by so doing could a serious loss to the bank be averted. None of these reasons, however, existed in the case at bar, or if they did the record before us does not disclose them. The cashier had no authority to bind the bank by buying the insurance company's stock. The board of directors had no authority to authorize him to do so; and if the cashier bought such stock in behalf of the bank the directors had no authority to ratify the purchase and thus bind the bank. * * * We conclude, then, that the powers of a directory of a bank in dealing with and in investing the funds of the stockholders are limited to the purposes for which the bank was incorporated and the purposes necessarily incidental thereto in the successful conduct of its legitimate business."[1] Unless necessary to prevent loss on a debt previously contracted in good faith, a national bank can make no valid loan or discount in security of its own stock.[2] And the placing by one bank of its funds on permanent deposit with another would be a loan within that provision of the National Banking Association Act which prohibits such loans.[3] A national bank, purchasing its own stock to protect itself against loss upon a debt, being bound to sell the stock within six months, may sell on credit and take the purchaser's note, with the stock sold as collateral, to secure it, provided it be done in good faith.[4] Where money has been borrowed of a bank, and the borrower has given as security certificates of his shares of the bank's stock, he would not be entitled to recover, when, on non-payment of this loan, the bank had sold the stock and applied the proceeds to his credit.[5] The opinion of the court, a brief one, rendered by Mr. Justice Field, stated the law in such case to be

[1] Bank of Commerce *v.* Hart, (1893) 37 Neb. 197, 205, 206. The cases referred to by the Nebraska court were Mechanics & Workingmen's Mutual Savings Bank & Building Association *v.* Meriden Agency Company, 24 Conn. 159; Franklin Co. *v.* Lewiston Institution for Savings, 68 Me. 43; Nassau Bank *v.* Jones, 95 N. Y. 115. As to the lack of power in one corporation to buy stock of another, see Milbank *v.* New York, L. E. & W. R. R. Co., 64 How. Pr. 20–29; Franklin Bank *v.* Commercial Bank, 36 Ohio St. 355; Central R. R. Co. *v.* Pennsylvania R. R. Co., 31 N. J. Eq. 475; Sumner *v.* Marcy, 3 Woodb. & M. 105; Central R. R. Co. *v.* Collins, 40 Ga. 582; Hazelhurst *v.* Savannah, G. & N. A. R. R. Co., 43 Ga. 13; People *v.* Chicago Gas Trust Co., 130 Ill. 268.

[2] Bank *v.* Lanier, 11 Wall. 369.

[3] Ibid.

[4] Union National Bank *v.* Hunt, (1882) 76 Mo. 439.

[5] National Bank of Xenia *v.* Stewart, 107 U. S. 676.

as follows: "Section 5201 of the Revised Statutes declares that 'no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association.' While this section, in terms, prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by any one except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves. There is another view of this case. The deceased authorized the bank, in a certain contingency, to sell the shares. Supposing it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize the bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the bank as his property. The administrators, indeed, affirm the validity of that sale by suing for the proceeds. As against the deceased, however, the money loaned was an offset to the proceeding. In either view the administrators cannot recover."[1] The Illinois Supreme Court has held, in a late case, that it was no defense in an action to recover a loan from a national bank that the bank had purchased shares of its stock which were pledged for the loan in violation of the law relating to national banking associations, where the purchase of the stock was consummated before the loan was obtained, and the lender had no knowledge of how the stock was acquired by the

[1] Ibid.

bank.[1] A national bank which had received the stock of a savings bank, and still retained it, and had received dividends on the stock, has been held to be estopped from denying its liability for its proportion of the indebtedness of the savings bank contracted during the time of its ownership of stock therein.[2]

§ 289. **Increase of capital stock.** — The comptroller of currency is clothed with power to assent to an increase of the capital stock of a national bank less than that originally voted by its directors but equal to the amount actually subscribed and paid for by the stockholders under the original vote.[3] The capital of a national banking association having become impaired by reason of past due and suspended claims, should its stockholders, to avoid a threatened assessment by the comptroller of currency upon the stock to make good the deficiency, lawfully reduce the capital stock in an amount equal to the deficiency, a stockholder cannot, in case the suspended claims be subsequently realized upon and carried into the account as assets, compel the bank to distribute a share of the money so realized in proportion to the amount of stock surrendered by him.[4] The validity of the proceedings for an increase of the stock of a national bank cannot be questioned by a stockholder who, with the knowledge of its insolvent condition and of all material facts, may have subscribed for increased stock to same amount as his original stock, and amount of proposed increase was afterwards reduced, in an action to annul his subscription and payment.[5]

§ 290. **Loans.**— Where a state bank has been organized into a national bank under the national law, and the national bank had taken from the state bank, among the discounted notes, one for a larger amount than the national bank was authorized to loan to a single borrower, the Supreme Court of Ohio held that such note or any note subsequently given in renewal of it was not to be regarded within the meaning of the national act as given for

[1] Chemical Nat. Bank of Chicago *v.* City Bank of Portage, (Ill. 1895) 40 N. E. Rep. 328.

[2] Kennedy *v.* California Savings Bank, (1894) 101 Cal. 495.

[3] Aspinwall *v.* Butler, 133 U. S. 595.

[4] McCann *v.* First National Bank, (1887) 112 Ind. 354.

[5] Delano *v.* Butler, 118 U. S. 634; Pacific National Bank *v.* Eaton, 141 U. S. 227; Thayer *v.* Butler, 141 U. S. 234; Butler *v.* Eaton, 141 U. S. 240.

money borrowed of the national bank.[1] In an action by a national bank for money loaned, the defendant cannot set up as a bar that the loans exceeded in amount one-tenth part of the capital stock of the bank.[2] The security taken by a national bank for loans will not be invalidated by the fact that the loans may be in violation of the act of congress which prohibits the lending of more than one-tenth of its paid-up capital to one person.[3] Should a bank accept a renewal note from the agent of the principal for an amount greater than is actually due, with fraudulent intent, it will vitiate the whole, and the bank cannot recover upon it. If it be a mistake, the bank may recover the amount actually due.[4] Should the maker of a note conspire with the president or other officer of a bank to defraud it, and on the faith of the note the bank parts with its money, the bank can recover it from the

[1] Allen *v.* First National Bank, Xenia, (1872) 23 Ohio St. 97.

[2] Gold Mining Co. *v.* National Bank, (1877) 96 U. S. 640. Mr. Justice HUNT, speaking for the court, said: "After obtaining and holding to its own use the money, can the mining company be allowed to interpose the plea that the bank had no right to loan the money? In Harris *v.* Runnels, 12 How. 79, where the defendant sued upon a note set up the illegality of its consideration, it was held that the whole statute then in question must be examined to discover whether it intended to prevent courts of justice from enforcing contracts in relation to the act prohibited; and that when a statute prohibited an act or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. A statute provided that slaves should not be brought into the state without a previous certificate signed by two freeholders. Slaves were brought in without such certificate and sold, and the purchaser was held liable for the purchase money. Mr. Justice WAYNE said that the rule was allowed not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy. In O'Hare *v.* The Second National Bank of Titusville, 77 Pa. St. 96, the question was made upon the statute we are considering, and it was objected that the bank could not recover the amount of the loan in excess of the proportion specified. The court held that the section of the statute referred to was intended as a rule for the government of the bank, and that the loan was not void. See, also, Pangborn *v.* Westlake, 36 Iowa, 546; Vining et al. *v.* Bricker, 14 Ohio St. 331. We do not think that public policy requires, or that congress intended, that an excess of loans beyond the proportion specified, should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interest of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank." See, also, Farmers' Bank *v.* Burchard, 33 Vt. 346.

[3] Stephens *v.* Bank, 88 Pa. St. 157.

[4] Bates *v.* Short, 3 Pennypacker (Pa), 495.

maker.[1] Where money is paid on forged paper by discounting or cashing it by a bank, it can be recovered back provided the bank has not materially contributed to the mistake itself, and has given a sufficiently early notice of the mistake to the other party after discovering it.[2] In a Vermont case, it appeared that the defendant signed a writing addressed to the person who was the cashier of the bank by name only, saying: "I wish you to discount a note," etc., and guaranteeing its goodness and payment. On the credit of this guaranty the bank discounted the note. The Supreme Court held that an action on the guaranty lay in the name of the bank counting upon a promise to the bank.[3]

§ 291. **Dividends on bank shares.**— The board of directors of a bank have discretionary power to declare dividends and the amount of same, and a very strong case must be presented to induce a court to interfere.[4] Where the articles of association of a bank provided that there should be a semi-annual dividend, and vested all the powers and privileges of the members of the association in a board of directors, the Court of Chancery of New York held that it was competent for the board to determine in any year not to declare a dividend, and that a shareholder could not maintain a bill to restrain the collection of the securities he had given the association in consideration of his shares, because they had determined to forego a dividend in that year.[5] A dividend declared and paid, and credited on a call for payment of the stock subscriptions by a banking association, having nearly a third of its capital locked up in a suspended and uncertain debt, though it was believed there would be no ultimate loss, has been held to be illegal as against the creditors of the association.[6] It has been held that a dividend declared by a bank could not be made payable in bills of county banks, solvent, but quoted below par in the city of New York.[7] A stockholder in a bank is not entitled to interest from the bank, either on ordinary dividends declared

[1] Tagg v. Tennessee National Bank, (1872) 9 Heisk. (Tenn.) 479.

[2] Third National Bank v. Allen, (1875) 59 Mo. 310.

[3] Woodstock Bank v. Downer, 27 Vt. 482.

[4] State v. Bank of Louisiana, 6 La. 746.

[5] Ely v. Sprague, (1840) Clarke, 351.

[6] Sagory v. Dubois, (1846) 3 Sandf. Ch. 466.

[7] Ehle v. Chittenango Bank, (1862) 24 N. Y. 548.

on his shares or on money due him from a reduction by the bank of its capital stock, for a period during which the bank may be prevented from paying him the same by attachments of his stock in suits pending in court between him and other parties, although the money thus belonging to him may be during such time mingled by the bank with its general assets, the bank being ready and willing to pay over the same but for the attachments, and having on hand all the time a balance of money sufficient for the purpose.[1] A national bank in Texas having declared a dividend, providing in its resolution that the cashier should not pay such dividend to the stockholders until the respective indebtedness of each stockholder should first be paid out of his portion of such dividend, and one of its stockholders being indebted as guarantor and otherwise of certain notes held by the bank, his dividend was applied to the payment of the same. He brought his action against the bank for his dividend. The court specially held that the bank could not set off against such dividend the amount of notes guaranteed by such stockholder, where the original makers had not been exhausted, and no effort had been made by the

[1] Mustard *v.* Union Nat. Bank, (Me. 1893) 29 Atl. Rep. 977. PETERS, Ch. J., said: "The [stockholder] contends that the bank, as to these funds, did not stand in the condition of an ordinary debtor, but became a stockholder or trustee for the owner of them; and that, having received the profits and benefits of the funds, it is liable for interest on the same. We do not feel satisfied to apply the rule invoked by the plaintiff. There was no promise of interest in any way, and no disposition to withhold the funds, except for self-protection. There was more money at all times on hand and unemployed than the sum due the plaintiff in readiness for appropriation on the debt. It would be an unheard of claim to charge a bank with a liability to pay interest on deposits or declared dividends when there is no promise to do so nor any fault on the part of the bank. And the funds in question were in no more favorable condition for the owner of them than ordinary deposits or dividends. All uncalled-for deposits and dividends held by any bank, or at any rate the bulk of them, become mingled in the moneys and investments of the bank, and that is one source of its legitimate business profits. * * * The cases in Massachusetts, where this same question has repeatedly arisen, are adverse to the plaintiff's claim. Oriental Bank *v.* Tremont Ins. Co., 4 Met. 1; Huntress *v.* Burbank, 111 Mass. 213; Smith *v.* Flanders, 129 Mass. 322. And we do not perceive that our own cases favor the claim. In Norris *v.* Hall, 18 Me. 332, the *debt* in the trustees' hands was on its face running upon interest. Blodgett *v.* Gardiner, 45 Me. 542, was a similar case. And in Abbott *v.* Stinchfield, 71 Me. 213, the trustee, an attorney at law, had collected funds for his client, and deposited them in a savings bank upon interest for his client's benefit."

bank to collect the notes from them, and they were not shown to be insolvent or beyond the jurisdiction of the court; and in case the maker of a note was insolvent and in the penitentiary or non-resident, protest and notice or suit at the first term were not necessary to hold the indorser, but the debts became an original liability of the indorser.[1]

§ 292. Lien of banks on moneys and securities of its customers.— A bank has a lien on all moneys and securities of a customer coming into its possession in the regular course of business for any balance due it on general account.[2] A banker's lien does not extend to all securities happening to be in his hands for any purpose.[3] A bank has no general lien on securities deposited with it by a customer as collateral for a particular debt.[4] The lien of a bank resting upon the presumption of credit extended on faith of securities in possession or expectancy, will not arise in reference to securities in possession of the bank under circumstances, or where there is a particular mode of dealing, inconsistent with such lien.[5] By the law merchant a banker has a general lien on all securities deposited with him by a customer for his general

[1] First Nat. Bank of Texarkana *v.* De Morse, (Tex. 1894) 26 S. W. Rep. 417. The Texas Civil Court of Appeals, upon the general principles of law involved in the case, said: "A bank, in its dealings with its customers, has a right to pay a debt due to it out of money in the possession of such bank to the general credit of such customers, whether derived from dividends or any other source. Traders' Nat. Bank of San Antonio *v.* Cresson, 75 Tex. 298; s. c., 12 S. W. Rep. 819, and authorities there cited; Nashville Trust Co. *v.* Fourth Nat. Bank, (Tenn.) 18 S. W. Rep. 822; Hagar *v.* Bank, 63 Me. 509; Morse on Banks, 34; Newmark on Bank Dep. § 22; Id. § 117. There is a general rule, subject to some exceptions, that a bank has a lien on all moneys and funds of a depositor in its possession to secure any balance due the bank by such depositor. Bank *v.* Weems, 69 Tex. 489; s. c., 6 S. W. Rep. 802; 1 Morse on Banks, § 324; Id. § 327; Newmark on Bank Dep. §§ 22, 117; Bank *v.* Hughes, 17 Wend. 94; Fegley *v.* McDonald, 89 Pa. St. 128; Bank *v.* Henninger, 105 Pa. St. 496; Bank *v.* Peck, 127 Mass. 300. Mr. Morse, in his excellent work on Banks and Banking (Vol. 2, § 699e), says: 'But the bank has a lien upon dividends; or, more properly, it may set off dividends accruing upon the shares of a stockholder against indebtedness of a stockholder to the bank, for the dividend is a simple debt owing from the corporation to the stockholder. Hagar *v.* Bank, 63 Me. 509.'"

[2] In re Tallassee Manufacturing Co., 64 Ala. 567.

[3] Petrie *v.* Myers, (Sup. Ct. N. Y. Spl. Term, 1877) 54 How. Pr. 513.

[4] Grant *v.* Taylor, 35 N. Y. Super. Ct. 338.

[5] Reynes *v.* Dumont, 130 U. S. 354.

balance, unless there be an express contract, or circumstances that show an implied contract inconsistent with such lien, and of this courts will take judicial notice.[1] The doctrine of bankers' liens is not the law of Pennsylvania.[2] A banker's lien does not extend to trust funds which his debtor, acting as an agent, has deposited in the name of a third person.[3] A banker has, upon a security pledged for a specific sum, a lien for that amount only, and he cannot, by reason of a banker's general lien on securities in his hands, extend it to cover other advances, unless by special agreement.[4] If there have been for a long time mutual dealings and an account current between two banks, in which they have mutually credited each other with proceeds of all paper remitted for collection when received, and charged all costs of protests, postage, etc., and transmitted their respective accounts regularly from one to the other, and settled them as the accounts of the respective banks; and upon the face of the paper transmitted it has always appeared to be the property of the banks respectively remitted on their own account, and balances have been generally allowed to remain until reduced by proceeds of such bills so transmitted from one to the other, in usual course of business, either of the banks would have a lien upon paper thus transmitted for a general balance of account, no matter who might be the real owner of the paper.[5] Where a bank paid an insolvent depositor's note, which it had indorsed, and which had been duly protested for nonpayment, and was afterwards garnished for deposits in its hands belonging to such depositor, the Texas Civil Court of Appeals held that the bank had the right to retain out of the deposit due the maker sufficient to secure it against loss, and was responsible only for the balance remaining in its hands after the payment by it of the depositor's note for which it had obligated itself by its indorsement.[6] It was held in a case in a federal court that the United States Revised Statutes, section 5242, which invalidates

[1] Wyman *v.* Colorado National Bank, (1879) 5 Colo. 30; citing Brandao *v.* Barnett, 3 Man., G. & S. 530. As to banker's lien upon securities belonging to his customers for balances due from them, see Cornwell *v.* Kinney, 1 Handy (Ohio), 496.

[2] Spring & Axle Co.'s Appeal, 111 Pa. St. 291.

[3] Falkland *v.* St. Nicholas National Bank of New York, (1881) 84 N. Y. 145.

[4] Duncan *v.* Brennan, (1881) 83 N. Y 487.

[5] Rathbone *v.* Sanders, (1857) 9 Ind. 217.

[6] Rosenberg *v.* First Nat. Bank of Texarkana, (Tex. Civ. App. 1894) 27

all transfers of the notes, bonds or bills of exchange of a national bank, after the commission of an act of insolvency, with a view to the preference of one creditor over another, does not prohibit a bank which has in good faith accepted the draft of a national bank the day before the latter's insolvency, and afterwards paid the same, from applying the proceeds of collections made by it on paper in its hands belonging to the insolvent bank to the payment of the draft since its lien on such collections runs from the date of acceptance.[1] The United States Circuit Court for the southern district of New York has held that the same statute did not prevent the retention of a balance standing to the credit of an insolvent national bank with a correspondent bank on the day of its failure, which balance had been pledged for the purpose of securing loans made to the insolvent bank by the correspondent bank.[2]

§ 293. **Lien of a bank on shares of stockholders for their debts to the bank.**— The Delaware court has sustained the validity of a by-law made by the directors of a bank that no stockholder should have the right to transfer his stock while indebted to the bank, and such by-law held to give the bank a lien on the stock for the debts of the holder thereof.[3] Where a bank issues stock transferable on its face there is no lien upon it

S. W. Rep. 897; citing Burrow *v.* Zapp, 69 Tex. 474; s. c., 6 S. W. Rep. 783; Traders' Nat. Bank of San Antonio *v.* Cresson, 75 Tex. 298; s. c., 12 S. W. Rep. 819.

[1] In re Armstrong, (1890) 41 Fed. Rep. 381.

[2] Bell *v.* Hanover National Bank, (1893) 57 Fed. Rep. 821; citing Bank *v.* Colby, 21 Wall. 613. LACOMBE, Circuit Judge, said further: "Neither the subsequent insolvency of the bank nor the appointment of the receiver destroyed the lien of defendant, nor its right to dispose of the pledge to satisfy the debt thus secured." Scott *v.* Armstrong, 146 U. S. 499; s. c., 13 Sup. Ct. Rep. 148

[3] McDowell *v.* Bank of W. & B., 1 Harr. (Del.) 27. As to lien on stock for debt of the stockholder, see Bank of Holly Springs *v.* Pinson, 58 Miss. 421; Conant *v.* Seneca County Bank, 1 Ohio St. 298. As to whether a by-law of a bank can create a general lien on the shares of a stockholder for any debt due the bank from the stockholder, so as to affect the creditors of the stockholder, see Nesmith *v.* Washington Bank, (1828) 6 Pick. (Mass.) 324. As to a bank having a lien upon the stock of a stockholder who may have died leaving notes due and to become due, payable to the bank, for the amount of the indebtedness, see Downer *v.* Zanesville Bank, (1833) Wright (Ohio), 477. As to the lien, given by its charter, to a bank on the stock held by the debtor, having a priority over a claim of the United States, see Brent *v.* Bank of Washington, 10 Pet. 596. As to the effect of a charter or by-laws of a bank prohibiting the transfer of shares of its stock until all the debts of the stock-

for any debt the stockholders owe the bank.[1] A bank may hold a cash dividend as pledged for the debt of its shareholders to the bank.[2] A bank has been held not to have a specific lien upon the dividends of one of its stockholders in consequence of its right to prevent the transfer of his stock until his debt to the bank should be paid.[3] A bank has no lien on the stock of one indebted to it in preference to other creditors. A *lis pendens* would give preference to such creditors.[4] A bank may waive the privilege given it by its charter of preventing the transfer of its stock by any stockholder whose debt to the bank is actually due, until payment of the debt.[5] The provision in such articles of incorporation that "no shares shall be transferable unless the shareholder previously discharge all debts due him by the association," has been held to include not only matured debts but also liabilities unmatured.[6] This lien attaches when the bank is asked to transfer the legal title. Where one becomes the owner of stock subject to this provision in the articles of which he has knowledge, and has omitted to give the bank notice of his ownership, thus enabling it to have credit on the faith of the assignor of the stock being a stockholder, he will have no superior equity to that of the bank.[7] A provision in the articles of association of a bank that no shareholder should transfer his shares, or receive a dividend thereon, who should owe the bank a debt then due, unless by consent, etc.; and another giving authority whenever such a debt should be past due to sell the stock and apply the proceeds to pay the debt, have been held to create a lien upon the stock in favor of the bank for the debts of the stockholder. The court also held that the debts of a partnership of which the stockholder was a member, were his debts within the rule.[8] In case a bank release for a time its lien given it by its charter, upon the stock of a shareholder for debts due by the latter to the bank, and

holder to the bank are paid, see Union Bank *v.* Laird, 2 Wheat. 390. That a bank may waive its right, under the last provision, see National Bank *v.* Watsontown Bank, 105 U. S. 217.

[1] Fitzhugh *v.* Bank of Shepherdsville, (1825) 3 Mon. (Ky.) 128.

[2] Hagar *v.* Union National Bank, 63 Me. 509.

[3] Brent *v.* Bank of Washington, 2 Cranch Cir. Ct. 517.

[4] Dana *v.* Brown, (1829) 1 J. J. Marsh. (Ky.) 304.

[5] Hodges *v.* Planters' Bank, 7 G. & J. (Md.) 306.

[6] Leggett *v.* Bank of Sing Sing, (1862) 24 N. Y. 283.

[7] Ibid.

[8] Arnold *v.* Suffolk Bank, (1857) 27 Barb. 424.

during that interval of time the stock be pledged by its owner for debt to a third party, the rights of the bank will be subordinate to the rights of the pledgee until his debt is paid or the stock released by the pledger.[1] The lien that a bank has upon the stock of its debtor will not be affected by the fact that the debt is barred by the Statute of Limitations.[2]

§ 294. Interest reserved by banks.— Legal interest, on sums discounted by banks, is that established by their chartesr.[3] They can, in no case, take more interest than that fixed by their charters.[4] Banking laws limit the right of a bank to take interest. Reserving or taking interest in excess of that limit, makes the transaction usurious, and the general usury law applies to it.[5] The taking of interest in advance upon loans made by a bank is within the well-established rules of banking. But after a note given to it has become payable, and in no manner taken up and renewed, a bank cannot lawfully take upon it a rate of interest exceeding the rate allowed by law.[6] Where a bank discounts a note payable directly to itself, it will not be usury to take the interest in advance for the time the note has to run, this being the usage of banks.[7] Discount means, *ex vi termini*, a deduction or drawback made upon advances or loans of money upon negotiable paper or other evidences of debt payable at a future time, which are transferred to a bank.[8] The rate of interest on loans

[1] Bank of America *v.* McNeil, (1877) 10 Bush (Ky.), 56.

[2] Farmers' Bank of Maryland *v.* Iglehart, 6 Gill (Md.), 55. That a national bank cannot create or hold, by its articles of association or by-laws, a lien on its stock to secure the indebtedness of stockholders to it, see Second National Bank of Louisville *v.* National State Bank of New Jersey, (1874) 10 Bush (Ky.), 375.

[3] Bank of Louisiana *v.* Sterling, 2 La. 62; Clinton County *v.* Kernan, 10 Rob. (La.) 174.

[4] Bank of Louisiana *v.* Stansbury, 8 La. 261.

[5] Rock River Bank *v.* Sherwood, 10 Wis. 230; Durkee *v.* City Bank, 13 Wis. 216; Brower *v.* Haight, 18 Wis. 102.

[6] Ticonic Bank *v.* Johnson, 31 Me. 414.

[7] Union Bank *v.* Corcoran, 5 Cranch Cir. Ct. 513.

[8] First National Bank *v.* Sherburne, 14 Bradw. (Ill.) 566. As to what is a discount, see Fleckner *v.* Bank, 8 Wheat. 338; Bank *v.* Johnson, 104 U. S. 271; Tracy *v.* Talmage, 18 Barb. 456; Niagara County Bank *v.* Baker, 15 Ohio St. 68; Pape *v.* Bank, 20 Kans. 440; Bank *v.* Sherburne, 14 Ill. App. 566; First Nat. Bank *v.* National Exchange Bank, 92 U. S. 122. As to interest, see Guthrie *v.* Reid, 107 Pa. St. 251; Barnet *v.* Bank, 98 U. S. 555; Nash *v.* Bank, 68 N. Y. 396; Bank *v.* Carpenter, 52 N. J. Law, 165; s. c., 19 Atl. Rep. 181; Bank *v.* Stauffer, 1 Fed. Rep. 187; Bank *v.* Childs, 133 Mass.

or discounts being limited in the charter of a bank, it cannot stipulate for a higher rate in consideration of its forbearance to sue.[1] It is not usurious in a bank to receive interest in advance on notes discounted by it.[2] Requiring and taking exchange in New York by a bank upon a note intended to be, and actually paid, in Wisconsin, in addition to ten per cent interest, has been held to be usury.[3] The taking of exchange, in addition to ten per cent in discounting a draft, was, however, held to be lawful, if not intended to evade the usury laws.[4] A national bank may take the rate of interest allowed to natural persons generally by the law of the state where it is located, and a higher rate where state banks of issue can take it.[5] National banks are subject to the penalty against usury imposed by the federal law and not to that imposed by state law.[6] Usurious interest paid a national bank on renewing a series of notes cannot, in an action by the bank on the last of the notes, be pleaded as a satisfaction of the debt.[7] The rule in Vermont is to treat the receiving by a bank of interest upon loans or discounts exceeding the rate prescribed by the laws of that state, as having the effect only to render the contracts void as to the excess of interest taken.[8] Interest alleged to be usurious, having been paid to a national bank, the usurious interest cannot afterwards be pleaded as a payment in an action

248; Alves *v.* Bank, 3 Browne Nat. Bank Cas. 452; c. f., Smith *v.* Bank, 26 Ohio St. 141; Bank *v.* Littell, 47 N. J. Law, 233. In N. Y. State Loan & Trust Co. *v.* Helmer, 77 N. Y. 64, 68, buying notes or advancing money on notes is distinguished from "discounting." Lester *v.* Bank of Mobile, 7 Ala. 490; Branch Bank at Mobile *v.* Strother, 15 Ala. 51; Kitchen *v.* Branch Bank at Mobile, 14 Ala. 233; Branch Bank at Montgomery *v.* Harrison, 1 Ala. 9. As to interest and usury on the part of a bank, and the effect of penalties, see Atlantic State Bank of Brooklyn *v.* Savery, (1880) 82 N. Y. 291; Nash *v.* White's Bank of Buffalo, (1877) 68 N. Y. 396.

[1] Exchange Co. *v.* Boyce, 3 Rob. (La.) 307. As to the reservation of interest in the way of discounts exceeding the rate of interest allowed a bank being a violation of its charter, see State *v.* Boatmen's Savings Institution, (1871) 48 Mo. 189.

[2] Duncan *v.* Maryland Savings Institution, 10 G. & J. (Md.) 299.

[3] Durkee *v.* City Bank, 13 Wis. 216.

[4] Central Bank *v.* St. John, 17 Wis. 157.

[5] Tiffany *v.* National Bank of Missouri, 18 Wall. 409. See, also, National Bank *v.* Johnson, 104 U. S. 271.

[6] Barker *v.* Rochester National Bank, 59 N. H. 310.

[7] Driesbach *v.* National Bank, 104 U. S. 52; Barnet *v.* National Bank, 98 U. S. 555. See, also, as to the remedy under the national law being exclusive, Stephens *v.* Monongahela Bank, 111 U. S. 197.

[8] Bank of Middlebury *v.* Bingham, 33 Vt. 621.

by the assignee of the bank.[1] The demand and receipt by a national bank of usurious interest from indorsers upon notes discounted by it, the payments of which notes may be guaranteed to the bank by a third party in a written guaranty, will not avoid the contract of guaranty between such third party and the bank.[2] In Pennsylvania a national bank cannot take more than six per cent upon the discount of a note, without showing that the state banks of issue are allowed to do so.[3] Where a charter of a bank provided "that said corporation shall not take more than at the rate of six per centum on its loans or discounts," a note on which in discounting the bank had reserved a rate of interest greater than six per cent, was held to be void for want of power in the bank to make such a contract.[4] National banks are subject only to the penalties prescribed by the United States Banking Association Act for taking usury.[5] Where usurious interest has been previously received by a national bank in the course of renewals of a series of notes, terminating in a note on which an action may be brought, the usurious interest cannot be pleaded by way of set-off or payment. The only remedy open to the party aggrieved is that prescribed by the act of congress — a separate action for double the interest paid by him.[6] A national bank located in Kansas, charging and receiving interest at the rate of eighteen per cent per annum, was held liable under the National Banking Act to pay back twice the amount of interest thus received.[7] The person paying such interest having

[1] Childs *v.* Alexander, 22 S. C. 185. That the laws of the state imposing penalties for taking usury do not apply to national banks, see Central Bank *v.* Pratt, (1874) 115 Mass. 539; Davis *v.* Randall, (1874) 115 Mass. 547. As to the provisions of the National Banking Act with reference to forfeiture for taking usurious interest, see Central Bank *v.* Pratt, (1874) 115 Mass. 539; Davis *v.* Randall, (1874) 115 Mass. 547. As to the power to deduct interest from the amount of the loan and in advance, see Maine Bank *v.* Butts, (1812) 9 Mass. 49; Agricultural Bank *v.* Bissell, (1832) 12 Pick. (Mass.) 586.

[2] Lazear *v.* National Union Bank of Maryland, at Baltimore, (1879) 52 Md. 78.

[3] Bank *v.* Gruber, 91 Pa. St. 377; Bank *v.* Bletz, 2 Pennypacker (Pa.), 170.

[4] Bank of Chillicothe *v.* Swayne, (1838) 8 Ohio, 257.

[5] Merchants & Farmers' National Bank of Charlotte *v.* Myers, 74 N. C. 514. As to a state court not having jurisdiction of a bill to recover usury paid to a national bank, see Hambright *v.* Cleveland National Bank, (1891) 3 Lea (Tenn.), 40; Farmers & Mechanics' Bank *v.* Dearing, 91 U. S. 29.

[6] Oldham *v.* Bank, 85 N. C. 240.

[7] Crocker *v.* National Bank of Chetopa, (1876) 4 Dill. 358.

gone into bankruptcy, the court held that the right of action for recovery of the penalty imposed by the act of congress passed to his assignee in bankruptcy.[1] The amount of the recovery was twice the full amount of interest paid, and was not limited to twice the excess of interest paid over the legal rate.[2] The Indiana Supreme Court has held that a note given to a national bank was not void, either as to the maker or surety, from the fact that the bank knowingly reserved and received usurious interest.[3] They also held that where an illegal rate of interest had been paid in advance, in an action on the debt by a national bank, the illegal interest could not be recouped.[4] In Indiana a national bank is entitled to charge and receive interest at the rate of ten per cent, to which may be added current rate of exchange for sight drafts, when *bona fide* made. In an action by a national bank on an evidence of debt, payable to it or its use, where it has unlawfully received illegal interest, the entire interest that the debt carries with it, or which has been agreed to be paid, will be forfeited, and no recovery can be had for interest unpaid.[6] The one who has paid the illegal interest may recover back double the illegal amount of interest he may have paid in an action for debt.[7] Where the assignment of error is the admission of certain evidence touching the consideration of a note discounted by a bank, the question whether the bank exceeded its powers by taking more than legal interest cannot be raised on error.[8] The Supreme Court of Colorado, in a very recent case, have accepted the con-

[1] Ibid.

[2] Ibid.

[3] Wiley *v.* Starbuck, (1873) 44 Ind. 298.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid. In La Dow *v.* First Nat. Bank of New London, 51 Ohio St. 234, it was held that a national bank located in that state might, since the repeal of the statutes fixing the rate of interest for banks of issue, reserve and charge interest at the rate of eight per cent. Shunk *v.* Bank, 22 Ohio St. 508, distinguished. As to interest and usury taken by banks, see Commercial Bank of Manchester *v.* Nolan, 7 How. (Miss.) 508; Grand Gulf *v.* Archer, 8 Smedes & Marsh. (Miss.) 151; Chambliss *v.* Robertson, 1 Cushman (Miss.), 302; Planters' Bank *v.* Snodgrass, 4 How. (Miss.) 573; Forniquet *v.* West Feliciana R. R. Co., 6 How. (Miss.) 116; Killingsworth *v.* Commercial Bank of Rodney, 9 Smedes & Marsh. (Miss.) 628; Knox *v.* Bank of United States, 4 Cushman (Miss.), 655; State *v.* Commercial Bank of Manchester, 4 George (Miss.), 474; Bailey *v.* Murphy, Walker (Mich.), 424; Farmers & Traders' Bank *v.* Harrison, 57 Mo. 503; Lyon *v.* State Bank, 1 Stew. (Ala.) 442.

[8] Murrah *v.* Branch Bank at Decatur, 20 Ala. 392.

clusions of the courts of certain states that national banks may charge as high a rate of interest as is allowed to either individuals or banks of issue in the various states of their organization; that in all states where there is a statute fixing a rate of interest, the only limitation upon this right must be found in the statute itself. The restriction contained in the National Banking Act, which forbade national banks to charge more than seven per cent interest only, became operative in the absence of state legislation on the subject. Wherever the state legislature has acted, the general grant of power to banks to charge whatever rate might be reserved by either citizens or banks of issue became operative. Under this construction thay said: "Banks in Colorado are placed on precisely the same footing as individuals. The legislative act on the subject fixed a rate, to wit, eight per cent, and further provided another rate of interest, which is determined by the agreement of the parties. That the legislature has failed to say the rate shall not exceed twelve per cent per annum, or five per cent per month, does not destroy the legal effect of the enactment, nor restrict its operations to other banks or citizens generally, nor make the case one where no rate of interest is named, whereby the federal limitation becomes operative. In common with these other courts, which have reached a similar conclusion, we hold that national banks in Colorado stand on the same footing in the matter of interest that other banks and individuals occupy."[1]

[1] Rockwell *v.* Farmers' Nat. Bank of Longmont, (Colo. 1894) 36 Pac. Rep. 905. The argument and reasoning of the court, speaking through Bissell, P. J., so fully explains the leading decisions of the courts, federal and state, and is so exhaustive of the whole subject that it is deemed worthy of a place in these notes. It was said: "In reality the only question involved is as to the right of a national bank in Colorado to reserve and receive, whether by way of loan or discount, a greater rate of interest than seven per cent. In no event could the sums paid by way of interest, even though illegal, be applied to the reduction of the principal sum due on the note. Though some states, in the litigations arising on the National Banking Act, adjudged this admissible where a counterclaim was a proper method of defense, the question was settled adversely to the claim by the Supreme Court of the United States. That court decided that, in suits upon notes where illegal interest was reserved, a defense based upon the reservation of the illegal interest would simply limit the recovery to the principal sum due. Barnet *v.* Bank, 98 U. S. 555; Driesbach *v.* Bank, 104 U. S. 52. The sole remaining inquiry concerns the recovery of the thirty-one dollars included in the judgment by way of interest, according to the tenor of the note. The statutes in Colorado concerning interest have been in force ever since it was a state. The act has always provided a specific rate

The United States Circuit Court of Appeals for the third circuit has held that the purchase of accepted drafts by a national bank from the holder without his indorsement at a greater reduction than lawful interest on their face value, was a discounting of those drafts, within the meaning of Revised Statutes United

of interest, which is now eight per cent, but the act regulating the matter has likewise contained a section permitting parties to stipulate for any rate of interest and authorizing the recovery of the stipulated interest. The National Banking Act, as amended in 1864 (§§ 5197, 5198, U. S. Stats.), in general provides that such banking associations may reserve and receive any rate of interest allowed by the law of the state wherein the bank is organized. There was some contrariety of opinion among the state courts as to the extent of the power conferred by these two sections and concerning the proper construction of the clause granting the banks the right to charge interest in those states where one rate was prescribed for banks of issue and another for persons generally. This matter has likewise been settled by the Supreme Court of the United States, which has held that the banks may charge either rate at their pleasure, selecting, if they choose, the maximum. Tiffany *v.* Bank, 18 Wall. 409. None of these Supreme Court decisions, however, touch the matter in issue, which is, are national banks in states having a statute upon the subject of interest which fixes a rate, but likewise contains a provision authorizing parties to stipulate as they may choose respecting this matter, authorized to contract like other citizens living within the sovereignty? This question has not been settled. The statute respecting national banks has been in force for upwards of thirty years, and considerable litigation has arisen on this particular question. The suits have taken various forms, and the query has been presented by way of defense to prevent the recovery of the stipulated interest, and likewise in actions brought to recover the penalty of twice the interest where the rate has been manifestly illegal. Nevertheless, it remains true that the question as here presented has never reached the Supreme Court of the United States. The case relied on by the appellant, and which at first blush would seem to sustain his contention, is Bank *v.* Johnson, 104 U. S. 271. This case went up on writ of error to the Court of Appeals of the state of New York, and the federal tribunal took jurisdiction because of the question involved. In support of our position that this case is not decisive of the present controversy, and in reality does not touch the principles under discussion, it is needful to state what that case is, the point at issue, and other questions determined. This was a penal action against the bank, brought originally by Johnson in the Supreme Court of New York to recover twice the interest alleged to have been reserved and received by the corporation in the business done by the parties. Johnson insisted that the bank was subject to the penalties and liable to the provisions of the statute respecting usury and interest in the state of New York, which, in general, provided that all usurious loans should be absolutely void and the lender could recover neither principal nor interest. On the other hand, the bank insisted that, according to the terms of the transaction, it was one entirely analogous to the discount of paper by the bank where the note was

States, section 5197, which prohibits national banks from taking interest on any loan or discount made by them at a greater rate than is allowed by the laws of the state where they are situated; also, that the acceptor of drafts so purchased might defend against the recovery of interest thereon by the bank, under

made by A. to the order of B., who indorsed and sold it to the bank. It must be remembered that these two propositions are dependent upon two considerations. That respecting usury is dependent upon positive statute; that respecting the law of discount is a judicial declaration of the law, and is not a creature of legislative enactment. For more than half a century it has been the law of New York that, in the matter of discount, banks were not amenable to the usury statute. It may seem like a judicial evasion of the law, but in that mercantile community it has never been changed, the courts holding in a case of that description there are two contracts resulting from the facts — the first, an executed contract concluded by the indorsement and delivery of the paper, whereby the title passes to the holder; the other, an executory agreement between the indorser and the indorsee, operative on the default of the maker. Of course the two contracts are somewhat different in their limitations, since in the one case the bank recovers from the maker the amount of the note and the interest, and, in the other, the sum loaned, which is treated as the consideration of the executory agreement. Both these questions were resolved by the Court of Appeals in the negative, and their conclusion was affirmed by the Supreme Court. It was decided that state statutes respecting usury were not applicable to the national banks, excepting in so far as they might be examined to ascertain what rate of interest the national banks were entitled to reserve. The scope of the Banking Act and the right of the general government to establish the system, delegate the power granted and impose restrictions on the banks organized under it were fully considered in the case of Bank *v.* Dearing, 91 U. S. 29. It was there decided that these banks were part of the instruments adopted to aid in the administration of the government in one of its most important departments. The corollary was that the states could exercise no control over them, nor in any wise affect their operations, except in so far as power might be granted by the act itself. This principle compelled the court to conclude that the usury laws in New York, save in the particular referred to, neither controlled nor in any wise affected Johnson's right of recovery. It was equally plain and so held by the court that the law declared in New York respecting the discount of paper had neither force nor application to the question at issue. In the first place it was not a matter of positive statute respecting the subject of interest, but was simply a judicial determination by the courts of New York that the discount of paper under the circumstances suggested did not come within the purview of the usury statute. Since the statutes of the state could only be resorted to for the purpose of ascertaining what rate of interest national banks might charge, manifestly the decisions of the appellate courts of that state respecting the matter of discounts were of no consequence, and afforded no possible solution of the query. There was another equally cogent reason, and one possibly more

Revised Statutes United States, section 5198, which provides that the taking of an unlawful rate of interest shall be deemed a forfeiture of the entire interest which the "bill or other evidence of debt carries with it," as this provision destroys the interest-bearing power of the instrument. Further, where the acceptor

conclusive of the subject. The federal statute itself, in section 5197, inhibited national banks from reserving other than the permissible interest, whether it was done by way of loan or by way of discount. The positive limitation of the section puts loans and discounts on the same identical basis. This of itself would prevent the application of the New York doctrine, and the negative answer to the inquiry given by the Court of Appeals was of necessity affirmed by the other tribunal. These were the only questions in that litigation. It is true that, in the course of the discussion concerning this matter, the court suggested that, when no rate of interest was fixed by the laws of the state, a bank could only charge seven per cent per annum. There are two reasons why that declaration by the court could not be taken as decisive of the present inquiry. As demonstrated, the case under consideration did not come up from a state where there was no statute fixing a rate, nor from one where the law fixed the rate, but permitted any rate to be charged which might be agreed upon between the parties. It came from a state having one fixed rate of interest, which, of course, under the federal statute, would be conclusive upon the rights of a national bank. In the next place, it was a statement *arguendo,* and could only be held to refer to a case where the laws of the state were silent." The court then discussed the state cases as follows: "Three of the cases presented the question in a somewhat different aspect from the one at bar, but one very illustrative of this theory of construction. They were actions upon notes reserving ten and twelve per cent interest, where the general rate was six, though the parties by contract were authorized to charge at the rate of ten and twelve per cent per annum. It was conceded that six was the general rate fixed by the statute, and that the other was totally dependent upon agreement of the parties; yet, the courts held that the national banks might reserve and receive whatever interest was allowed by the law of the state regulating the matter. Wiley *v.* Starbuck, 44 Ind. 298; Newell *v.* Bank, 12 Bush, 57; Crocker *v.* Bank, 1 Thomp. Nat. Bank Cas. 317; s. c., Fed. Cas. No. 3,397. It will be observed that in these cases the rate was established by the law of the state, and there was a limit put by the same laws, beyond which neither individuals nor banks could go. Within the limit, interest might be reserved. The courts, in reaching their conclusion, proceeded upon the hypothesis that, under the National Banking Act, the bank might charge any interest allowed by the laws of the state in which it was organized, even though the rate above six must be the subject of convention, and, unless the limit were reached, the rate as a rate would not be stated. This was regarded as of no moment in the interpretation of the statute. It is very plain that if the bank had reserved nine per cent, while the respective limits were six and ten, an amount would have been charged in a case where there was no definite legislation directly authorizing either the individual or the bank to charge nine per cent, other than that flowing from the

of such drafts makes a payment to the bank without any direction as to its application, the payment cannot be applied to the forfeited interest, but must be credited on the face value of the drafts.[1] The limitation of two years, within which an action, under the provisions of section 5198, Revised Statutes United States, may be commenced for the recovery from a national bank of twice the amount of money paid to it, dates from the actual payment of interest, and not from the bank's reservation of it from the original loan by way of discount.[2]

legislation which made the matter of interest between two definite limits a subject of convention. This distinction does not seem of very much consequence in the solution of the inquiry." "If it be true that, in a state where interest may be the subject of an agreeement, the bank may reserve whatever the parties agree upon up to a maximum, then all statutes reserving the right of agreement of parties, whether they name a maximum or not, must be equally effectual for the purposes of a grant of power. The definite question under consideration has been expressly settled against the appellant in three different states. National Bank of Jefferson *v.* Bruhn, 64 Tex. 571; Hinds *v.* Marmolejo, 60 Cal. 229; Bank *v.* Stover, 60 Cal. 387; Guild *v.* Bank, (S. D.) 57 N. W. Rep. 499."

[1] Danforth *v.* National State Bank of Elizabeth, (1891) 48 Fed. Rep. 271.

[2] Smith *v.* First Nat. Bank of Crete, (Neb. 1894) 60 N. W. Rep. 866, following Bank *v.* Smith, 36 Neb. 199; s. c., 54 N. W. Rep. 254; followed in Lanham v. First Nat. Bank of Crete, (Neb. 1894) 60 N. W. Rep. 1041. The court referred to the few cases bearing upon the subject in these words: "In Duncan *v.* Bank, 1 Thomp. Nat. Bank Cases, 360; s. c., Fed. Cas. No. 4,135, KETCHAM, J., instructed the jury as follows: "From the origin of the loan — from the retaining of the first discount, through all the renewals, up to the time of final payment of the principal, or up to the time of entering judgments — there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. Up to that time he may make this election. When payment is actually made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete. The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgments on all the Duncan & Bros.' notes were entered, near the time of bringing the suits, less than two years before. The payment and the judgment concluded the transaction, and determined their character to be usurious. Till that time it was undetermined, and the statute did not begin to run.'" In the case of Bank *v.* Davis, reported in Fed. Cas. No. 10,038, is found the opinion of GRESHAM, J., in which he quoted the section of the National Banking Act with which we have to deal. * * * Having quoted this language, Judge GRESHAM commented on it as follows: "If a national bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the inter-

§ 295. A bank's duty as to securities deposited with it.— The findings of the court in this case were that the owners of certain bonds first placed them for safe-keeping with a firm of bankers. Afterwards they repeatedly asked for discounts of their notes by the bankers, offering them the bonds deposited with them as collateral, and the discounts were made. When the notes thus secured were paid the bankers called upon the owners of the bonds to know what they should do with them; they were informed that they were to hold them for the owners as previously. The owners had already written to the bankers that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their accounts, and that they

est, and suit be brought to recover the loan, and the borrower plead the usury, the bank will recover the face of the note, less the entire interest taken out, received, or reserved, and no more. It will thus collect the sum of money it actually paid out, being punished for receiving interest in excess of the legal rate by forfeiting all interest. But if the note thus discounted be renewed for the same amount, the borrower paying usurious interest out of his pocket in advance, and suit be brought on the renewed note, the defendant may recoup double the amount of the entire interest actually paid on renewal, or, in an independent action of debt, he may recover from the bank double the amount of the entire interest thus paid." In Higley *v.* First National Bank of Beverly, 26 Ohio St. 75, McIlvaine, J., on page 79 *et seq.*, made use of the following language, in reference to that part of the section above referred to: "By the first provision in that part of the section above quoted, if the contract or promise to pay usurious interest be unexecuted, it cannot be enforced, and in such case the debtor is released from the payment, not only of the interest in excess of the lawful rate, but 'the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon,' must be held and adjudged to be forfeited. By the latter provision, if usurious interest 'has been paid,' twice the amount of interest may be recovered back from the association 'taking or receiving' it, provided the action therefor be commenced within two years from the time the usurious transaction occurred. And, by construing the whole section together, we are inclined to believe that, in case usurious interest has been received at the time of the loan or discount, there is left to the bank a *locus penitentiæ.* In such case, the bank may, upon receiving payment of the debt, discharge itself from all liability to the debtor by giving credit for the amount of interest received; otherwise, the debtor may insist upon a reduction of his indebtedness to the amount actually loaned or advanced, or he may pay the whole claim, and afterwards, within two years, recover back twice the amount of interest paid." See Shinkle *v.* First National Bank of Ripley, 22 Ohio St. 516, which supports the above views. Other cases referred to are Hall *v.* Bank, 30 Neb. 103; s. c., 46 N. W. Rep. 150; Brown *v.* Bank, 72 Pa. St. 209.

would consider the bonds as security for such overdrafts. The court was of opinion from these facts that the bonds were held by the bankers as collateral security to meet any sums which the owners of the bonds might overdraw, and the accounts showed that they did subsequently overdraw in numerous instances. These bonds were originally sold by the bankers to the owners and left with them for safe-keeping. An absconding cashier of the bankers had stolen the bonds, and the owners brought this action to recover the value of the bonds of the bankers. The United States Supreme Court held that when bonds, originally deposited with the bankers for safe-keeping, were, by agreement of the bailors and bailees, made a standing security for the payment of loans to be made by the bank to the owners of the bonds, the bailees became bound to give such care to them as a prudent owner would extend to his own property of a similar kind.[1]

[1] Preston *v.* Prather, (1891) 137 U. S. 604, affirming the judgment in favor of the plaintiff rendered in Prather *v.* Kean, 29 Fed. Rep. 498. The court referred to the following cases in support of their judgment, to wit: "In * * * Third National Bank *v.* Boyd, 44 Md. 47, it appeared that a firm * * * a large customer of [the bank] [*on a* certain date] was indebted to it in about five thousand dollars. Subsequently, the senior member of the firm, pursuant to an agreement between him and the president of the bank, deposited with the bank certain bonds and stocks as collateral security for the payment of all obligations of himself and of the firm then existing or that might be incurred thereafter, with the understanding that the right to sell the collaterals in satisfaction of such obligations was vested in the officers of the bank. Some of the bonds were subsequently withdrawn and others deposited in their places. While these collaterals were with the bank the firm kept a deposit account, having an average of about four thousand dollars, and from time to time, as it needed, obtained on the security of the collaterals discounts ranging from three to fifteen thousand dollars. The firm was not indebted to the bank subsequently to July, 1872, when it paid its last indebtedness; the bonds, however, were not then withdrawn, but left in the bank under the original agreement. In August, 1872, the bank was entered by burglars and certain of the bonds were stolen. In an action by the senior partner against the bank to recover the value of the bonds stolen it was held: 'First, that the contract entered into by the bank was not a mere gratuitous bailment. * * * Third, that the original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the plaintiff's debt had been paid. Fourth, that the defendant was responsible if the bonds were stolen in consequence of its failure to exercise such care and diligence in their custody and keeping as at the time banks of common prudence in like situation and business usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of the property,

§ 296. The rights of a bank as to securities pledged to it. —In this case it appeared that an agent, in pursuance of his principal's instructions, loaned money on pledges of personal property for which property he took warehousing receipts in his name as "agent." He then pledged these warehousing receipts to a bank to secure his individual debts to the bank, the latter having knowledge of the business relations between this agent and his principal and the operations in which they were engaged. The bank afterwards sold the goods represented by these warehousing receipts and applied the money to the payment of the debts of the agent who had pledged them to it. This action was brought by the owner, the principal of the pledgor, for the recovery of their value from the bank. The United States Circuit Court for the district of Maryland held that the knowledge above referred to, together with the use of the word "agent" on the receipts, was sufficient to put the bank upon inquiry, and it was liable to the principal for the amount realized by it from the sale of the goods.[1] The bank contended that the agent having

and should have been proportioned to the consequences likely to arise from any imprudence on the part of the defendant. Fifth, that the proper measure of damages was the market value of the bonds at the time they were stolen. Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security, is a question of fact exclusively within the province of the jury to decide.' In * * * Cutting *v.* Marlor, 78 N. Y. 454, it appeared that the defendant, as collateral security for a loan made to him by a bank, delivered to it certain securities, which were taken and converted by the president to his own use. In an action by the receiver of the bank to recover the amount loaned, it was found that the trustees of the bank left the entire management of its business with the president and assistant, styled manager; that they received the statements of the president without question or examination; that they had no meetings pursuant to the by-laws, and made no examination of the securities, and exercised no care or diligence in regard to them; also, that the president had been in the habit of abstracting securities and using them in his private business, most of them being returned when called for; and that the manager, who had knowledge of this habit, did not take any means to prevent it, nor did he notify the trustees. It was held that the bank was chargeable with negligence, and that the defendant was entitled to counterclaim the value of the securities; that the bailment was for the material benefit of the parties; that the bailee was bound, for the protection of the property, to exercise ordinary care, and was liable for negligence affecting the safety of the collaterals, distinguishing the case from the liability of a gratuitous bailee, which arises only where there has been gross negligence on his part."

[1] Thurber *v.* Cecil National Bank, (1892) 52 Fed. Rep. 513. See as authority for this rule National Bank *v.*

authority to sell and the provisions of certain statutes of Maryland relieved it from liability. The court held that the fact that the agent had authority to sell did not affect the duty of the bank to make inquiry, as authority to sell did not include authority to pledge, nor was the bank excused from liability by the Maryland Factors' Act (Code, art. 2), providing that any person intrusted with storekeeper's certificates or other similar documents showing possession may pledge the goods to anybody who is without notice that such person is not the actual owner, the word "agent" in the receipts and the circumstances charging the bank with notice; nor by article 14 of the Maryland Code, declaring storage receipts to be negotiable instruments in the same manner as bills of lading and promissory notes; for when the fiduciary character of the holder is expressed on the face of a negotiable instrument notice is thereby given to the indorser that the holder *prima facie* has no right to pledge.[1] In this case the plaintiff's action was for certain coupon railroad mortgage bonds which it was claimed the bank became wrongfully and illegally possessed of. Plaintiff, the owner of these bonds, had placed them with certain brokers to cover margins in transactions in the purchase of stocks by them on his account. These brokers, keeping a regular account with the bank in their usual course of business, had placed these bonds with other securities as collateral with the bank under an agreement to this effect: "We hereby agree with the St. Nicholas National Bank of New York, in the city of New York, that in case we shall become or be at any time indebted to said bank for money lent or paid to us or for our account or use, or for any overdraft, in any sum or amount then due and payable, the said bank may, in its discretion, sell at the brokers' board or at public auction or private sale, without advertising the same, and without notice to us, all, any and every collateral securities, things in action and property held by said bank for securing the payment of such debt, and apply the proceeds to the payment of such indebtedness, the interest thereon, and the expenses of sale,

Insurance Co., 104 U. S. 54; Duncan *v.* Jaudon, 15 Wall. 165; Warner *v.* Martin, 11 How. 225; Taliaferro *v.* Bank, 71 Md. 208; s. c., 17 Atl. Rep. 1036; Lowry *v.* Bank, Taney, 310; Shaw *v.* Spencer, 100 Mass. 382; Dillon *v.* Insurance Co., 44 Md. 386.

[1] Ibid. In support of these rules see Allen *v.* St. Louis Bank, (1887) 120 U. S. 20, 32; s. c., 7 Sup. Ct. Rep. 460; Kinder *v.* Shaw, 2 Mass. 398; Phillips *v.* Huth, 6 Mees. & W. 572, 596; Cole *v.* North Western Bank, L. R., 10 C. P. 354, 363.

holding ourselves responsible and liable for the payment of any deficiency that shall remain unpaid after such application." The bank paid and advanced for these brokers on the faith of the bonds and other securities large sums of money. The brokers failed in business, and owed the bank a large sum for checks certified by it and outstanding, and for money paid by it up to the close of the business a few days before their failure. There was no notice or claim as to the ownership of the bonds involved by the alleged owner until two weeks after the failure of his brokers. The bank in good faith and on the best available terms made sale of the bonds and other securities and credited its depositors, the brokers, with the proceeds, which left a small deficiency which it never received. This case was tried on a circuit of the Supreme Court of the State of New York, and the plaintiffs asked the court to direct a verdict against the bank and in their favor on the ground that the certification of the checks by the bank was void, because it was unlawful, being a certification of checks drawn by the brokers when they had no money on deposit to their credit with the bank, and the bank could not hold the bonds as against such unlawful certification, and on the further ground that the bank did not take the bonds in the ordinary course of business. The trial court refused and directed a verdict for defendant. Exceptions to this judgment came before the Supreme Court in General Term, and the court denied a motion of plaintiffs for a new trial with an order that the defendant have judgment against the plaintiffs upon the verdict with costs.[1] The case was carried to the United States Supreme Court,

[1] Thompson *v.* St. Nicholas National Bank, (1888) 47 Hun. 621; affirmed in Thompson *v.* St. Nicholas National Bank, (1889) 113 N. Y. 325, in which case RUGER, Ch. J., remarked: "That the statute of the United States affirmed the validity of the contract of certification, and expressly provided the consequences which should follow its violation; that the penalty incurred was impliedly limited to a forfeiture of the bank's charter and the winding up of its affairs; that it was thus clearly implied that no other consequences were intended to follow a violation of the statute; and that it would defeat the very policy of an act intended to promote the security and strength of the national banking system, if its provisions should be so construed as to inflict a loss upon the banks and a consequent impairment of their financial responsibility." The court then cited to support that view National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99, and National Bank of Xenia *v.* Stewart, 107 U. S. 676. It was further said "that the statute in question had no application to the question involved in this suit, which concerned only the relations between [the brokers]

on a writ of error, there being a federal question involved, the construction and effect upon this contract of the United States Revised Statutes, section 5208, providing: "It shall be unlawful for any officer, clerk or agent of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank at the time such check is certified an amount of money equal to the amount specified in such check; and any check so certified by duly authorized officers shall be a good and valid obligation against such bank; and any officer, clerk or agent of any national bank violating the provisions of this act shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in [the section of an act, the provisions of which were

and the [bank]; that by the deposit of the bonds the former secured the promise of the [bank] to protect their checks of a certain day for a specified amount; that the certification of the checks was entirely aside from the agreement between [the brokers] and the [bank], and was a contract between the [bank] and the anticipated holders of the checks; that [the brokers] had received the consideration of their pledge when the [bank] agreed with them to honor their checks, and that would have been equally effectual between the parties without any certification; that the certification was simply a promise to such persons as might receive the checks that they should be paid on presentation to the [bank], in accordance with its previous agreement with [the brokers]; that the legal effect of the agreement was that the [bank] should loan a certain amount to [the brokers], and would pay it out on their checks to the persons holding such checks; that it was entirely legal for the [bank] to contract to pay [the brokers'] checks, and it did not affect the legality of that transaction that the [bank] also represented to third parties that it had made such agreement, nor could any other party standing in the shoes of [the brokers]; that the fact that the [bank], in connection with the agreement to pay such checks, had also promised third parties to pay them, could not invalidate the liability previously incurred, or impair the security which had previously been given to the [bank] upon a valid consideration; that the fact of the certification was entirely immaterial in respect to the liability incurred by [the brokers] to the [bank]; that there was no evidence impairing the title to the bonds acquired by the [bank] through the transfer of them to it by [the brokers]; that the purpose for which the bonds were transferred by [their original owner] to [the brokers] contemplated their transfer and sale by the latter to third persons; that the [bank] acquired a valid title to them by their transfer to it; that the transaction between [the brokers] and the [bank] was in the ordinary course of business pursued by the latter; that it received the bonds in good faith for a valuable consideration, and within all the authorities this gave it a good title to the bonds; that it was authorized to deal with them for the purpose of effecting the object for which they were transferred to it; that its right to hold the bonds continued so long as any part of its debt against

that the comptroller of the currency might forthwith appoint a receiver to wind up the affairs of the banking association]." The Supreme Court affirmed the decision of the New York Court of Appeals.[1] In this case a national bank in a failing condition, while being pressed by its customers, remitted securities in the form of bills of exchange, notes, etc., to a large amount to its correspondent bank in another city, on which it asked advances or loans for its relief and also authorized the holding of these securities as collaterals to protect against its overdrafts. The failing bank finally succumbed to the pressure, and was placed in the hands of a receiver. The receiver brought action against the bank holding these securities, claiming a right to their possession in himself as assets of the bank. The contention on the part of the receiver was that the United States Revised Statutes, sec-

[the brokers] remained unpaid; that the [original owner] could at any time have established his equitable right to a return of the bonds, and could have procured their surrender by paying the amount for which they were pledged, but he refrained from doing so, and impliedly denied any right in the [bank] by demanding the unconditional surrender of the bonds, and that he never became entitled to such surrender, and of course was not authorized to recover possession of them."

[1] Thompson *v.* St. Nicholas National Bank, (1892) 146 U. S. 240. Mr. Justice BLATCHFORD, for the court, approved the views of the New York Court of Appeals as sound and as covering the case. He then said: "The agreement [before referred to] between [the brokers] and the [bank] did not call for any act violating the statute. There was nothing illegal in providing that the securities which the bank might hold to secure the debt to it of [the brokers] should be available to make good such debt. The statute does not declare void a contract to secure a debt arising on the certificates which it prohibits. In addition to that, the statute expressly provides that a check certified by a duly authorized officer of the bank, when the customer has not on deposit an amount of money equal to the amount specified in the check certified, shall nevertheless be a good and valid obligation against the bank; and there is nothing in the statute which, expressly or by implication, prohibits the bank from taking security for the protection of its stockholders against the debt thus created. There is no prohibition against a contract by the bank for security for a debt which the statute contemplates as likely to come into existence, although the unlawful act of the officer of the bank in certifying may aid in creating the debt. In order to adjudge a contract unlawful, as prohibited by a statute, the prohibition must be found in the statute. The subjection of the bank to the penalty prescribed by the statute for its violation cannot operate to destroy the security for the debt created by the forbidden certification. If the [original owner] had pledged the bonds to the [bank], he could not, after receiving [the bank's] money, have replevied the bonds; and after possession of the bonds had been given

tion 5242, which prohibits all transfers by any national banking association after the commission of an act of insolvency, or in contemplation thereof, with a view to the preference of one creditor to another, had been violated by the insolvent bank, and that the correspondent bank had, therefore, no title in or lien upon the securities which it held. WALLACE, J., of the United States Circuit Court for the southern district of New York, held that the statute was directed to preference, not to the giving of a security when a debt is created; and if the transaction be free from fraud in fact, and is intended merely to adequately protect a loan made at the time, the creditor can retain property transferred to secure such a loan until the debt is paid, though the debtor is insolvent, and the creditor has reason at the time to believe that to be the

by him to [the brokers], and after they had been subsequently taken by the [bank] in good faith, neither he, nor his executors can set up the statute to destroy the debt. This construction of the statute in question is strengthened by the subsequent enactment, making it a criminal offense in an officer, clerk or agent of a national bank to violate the provisions of the act. [Rev. Stats. U. S. § 5208, to wit: Act July 12, 1882, § 13, c. 288; 22 Stats. at Large, 166.] This shows that congress only intended to impose, as penalties for over certifying checks, a forfeiture of the franchises of the bank and a punishment of the delinquent officer or clerk, and did not intend to invalidate commercial transactions connected with forbidden certifications. As the [bank] was bound to make good the checks to the holders of them, because the act [heretofore referred to] declares that the checks shall be good and valid obligations against the [bank], it follows that [the brokers] were bound to make good the amounts to the [bank]. It necessarily results that the [bank], in paying the checks, was as much entitled to resort to the securities which [the brokers] had put into its hands, as it would have been to apply money which they might have deposited to meet the checks. Moreover, it has been held repeatedly by this court that where the provisions of the National Banking Act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99, National Bank of Xenia *v.* Stewart, 107 U. S. 676. The bonds in question came into the possession of the [bank] before it certified the checks. They were not pledged to it under any agreement or knowledge on its part, or in fact on the part of [the brokers], that subsequent certificates would be made. The certificates were made after the pledge and created a debt of [the brokers], which arose after the pledge. The agreement [at the time of depositing the collaterals] applied and became operative simultaneously with the certifications, but independently of them, as a legal proposition. In Logan County Bank *v.* Townsend, 139 U. S. 67, 77, decided in March, 1891, after the present case was de-

fact.[1] In the same case the correspondent bank insisted that it acquired a banker's lien upon the securities for the amount of any balance upon its general account with the insolvent bank which remained unpaid. But the court held that a banker's lien for the amount of the balance of its general account does not exist when the securities have been deposited with the bank for a special purpose or for the payment of a particular loan.[2]

cided by the Court of Appeals of New York, this court approved the decision in National Bank *v.* Whitney, 103 U. S. 99, and said that a disregard by a national bank of the provisions of the act of congress forbidding it to take a mortgage to secure an indebtedness then existing, as well as future advances, could not be taken advantage of by the debtor, but 'only laid the institution open to proceedings by the government for exercising powers not conferred by law.'"

[1] Armstrong *v.* Chemical National Bank, (1890) 41 Fed. Rep. 234. It was said by the court: "The naked fact that the Fidelity Bank was insolvent at the time it sent the securities to the defendant does not imply that the transfer of the securities was made in contemplation of insolvency, or with a view of a preference of the defendant over its other creditors. Although, in the light of subsequent events, the Fidelity Bank was insolvent, it may be that its insolvency was not suspected by its officers. So far as appears no act of insolvency had been committed. A bank is not in contemplation of insolvency until the fact becomes reasonably apparent to its officers that it will presently be unable to meet its obligations, and will be obliged to suspend its ordinary obligations. Roberts *v.* Hill, 24 Fed. Rep. 571. Until this condition of affairs exists, certainly a national banking association does not violate the statute by pledging its securities to a reasonable amount to raise money needed to meet an unexpected run. The best managed institutions are liable to such contingencies, and the right to use their assets in an honest attempt to bridge over such a crisis is indispensable to their safety. Obviously the exercise of this right would be impracticable if the pledge becomes void whenever the attempt of the bank to rescue itself from failure becomes unsuccessful."

[2] Armstrong *v.* Chemical National Bank, (1890) 41 Fed. Rep. 234. WALLACE, J., said: "It is familiar law that a banker has a lien upon all funds and securities in his possession, deposited with him in the usual course of business by a customer to facilitate the financial transactions contemplated between them, which extends to the payment of any balance on general account. The lien arises from the implied understanding of the parties that credit is to be given in the course of dealings between them by the banker to the customer upon the faith of the securities. It is equally familiar law that the lien does not exist when the securities have been deposited for a special purpose, or for the payment of a particular loan; and where they are delivered specifically to protect the banker in a particular transaction, or series of transactions, he has no lien upon them for any other purpose, and cannot assert one for any other indebtedness whether arising upon general account or otherwise. This doctrine has recently been reiterated and applied by the Supreme Court in Reynes *v.* Dumont, 130 U. S. 354; S. C., 9 Sup. Ct. Rep. 486. That was a case

§ 297. Personal guaranty of a bank by stockholders and directors.— The United States Circuit Court of Appeals for the fifth circuit has held that a personal guaranty given by stockholders and directors of a bank to another bank in consideration of "loans, discounts or other advances to be made," for the repayment of any indebtedness thus created, imposed a liability on the guarantors when acted on by the guarantee, though no notice of acceptance of the guaranty was given, the contract showing a personal interest of the guarantors in the advances, constituting a consideration moving to them.[1]

§ 298. Misrepresentations by a bank as to solvency of a customer.— A state bank having loaned large sums of money to a manufacturing corporation upon representations made to it by a national bank through its cashier as to the good standing, etc., of the corporation, which were not repaid to the bank by reason of the insolvency of the corporation, brought its action against the national bank to recover damages for what it alleged

in which securities consisting of two hundred and seventy-five thousand dollars of municipal bonds had been left by one banking firm with another for a period of two years and a half, during which large transactions on general account took place between them; various loans were made to the former by the latter upon an express pledge of the bonds, and the former, at the request of the latter, had also obtained various loans of other bankers by pledging so many of the bonds as was necessary in the particular transaction. The court found as a fact that the bonds were left with the banking firm originally as collateral for a particular loan; that there was no express understanding between the two banking firms that they were to stand as a security for general transactions, and that the loans subsequently made upon them were specific loans accompanied by an express pledge, and held that these circumstances were inconsistent with the existence of a general lien. If the sending of the securities [in this case] had resulted, either in consequence of a subsequent express contract, or in consequence of any implication from the nature of the transaction, in giving the defendant a lien for the antecedent indebtedness of the [insolvent] bank, it is extremely doubtful whether the transaction could be upheld. The cases of Bank *v.* Colby, 21 Wall. 609, and Bank *v.* Butler, 129 U. S. 223; s. c., 9 Sup. Ct. Rep. 281, take a view of the statute which suggests that no preference can be obtained by one creditor of a national bank over another, after the bank has become insolvent, whether obtained with the consent of or by adversary proceedings against the bank and whether the creditor has or has not any reason to suppose the bank to be insolvent at the time."

[1] Doud *v.* National Park Bank of New York, (1893) 54 Fed. Rep. 846. See Davis *v.* Wells, 104 U. S. 159, for a review of the precedents in such case and a statement of their doctrine.

were fraudulent misrepresentations as to the standing, etc., of the corporation. Different defenses were made by the bank to this suit. Among others, it contended that neither the bank itself nor its cashier had power to make such representations as were made concerning the standing or credit of the corporation. The United States Circuit Court for the district of Oregon held that the national bank was liable for fraudulent representations made by it through its cashier to the other bank as to the financial responsibility of its customer.[1] There was a contention in this case, the letter containing the misrepresentations as to the credit of the corporation seeking loans being signed simply by the cashier of the national bank sued, that the action upon the representation was barred by the Statute of Frauds. The provision in the Code of Oregon, in substance a reproduction of Lord TENTERDEN'S act (9 Geo. IV, chap. 14, § 6), was as follows: "No evidence is admissible to charge a person upon representation as to the credit, skill or character of a third party unless such representation or a memorandum thereof be in writing and either subscribed by or in the handwriting of the party to be charged." Under this contention arose the question whether the letter as written and signed by the cashier of the national bank was the

[1] Nevada Bank of San Francisco *v.* Portland Nat. Bank, (1893) 59 Fed. Rep. 338. GILBERT, Circuit Judge, said: "The defendants contend that the defendant bank, which is a national bank, had not the power to assume a liability for its own error or mistake in certifying to the financial standing of a customer seeking credit at another bank. It must be conceded that it had not the power to assume such liability *ex contractu*, but in the case of a tort committed by the bank or its officers a different principle is applied. In such a case it is the rule that the corporation is liable for the negligence or other tort of its agents and servants, even when performing acts that are *ultra vires*. In the case of Merchants' Bank *v.* State Bank, 10 Wall. 604, the court said: 'Corporations are liable for every wrong of which they are guilty, and in such case the doctrine of *ultra vires* has no application. Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances.' In Bank *v.* Graham, 100 U. S. 699, 702, the court said: 'An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel.'" The same doctrine is applied in the cases of Railroad Co. *v.* Derby, 14 How. 468; Railroad Co. *v.* Quigley, 21 How. 202; Etting *v.* Bank, 11 Wheat. 59; Bissell *v.* Railroad Co., 22 N. Y. 258.

letter of the bank and the signature the signature of the bank within the meaning of this statute. The court held that it was.[1]

[1] Nevada Bank of San Francisco *v.* Portland Nat. Bank, (1893) 59 Fed. Rep. 338. GILBERT, Circuit Judge, *arguendo*, said: "It is argued that the signature of the cashier of the defendant bank, attached to the letters, is not the signature of the bank. The English case of Swift *v.* Jewsbury, L. R., 9 Q. B. 301, decided in 1874, is relied upon as giving that interpretation to the statute. In that case a letter had been written to the manager of a bank, requesting his opinion of the standing of one who was seeking credit. The answer was signed 'J. B. Goddard, Manager.' The banking company had no knowledge that such letter had been written, and gave the manager no express authority to write the same. The company was not a corporation. It was a copartnership, with certain privileges conferred by statute. It could sue and be sued only in the name of one of its public officers, and its members could not be made liable in respect to transactions with the company until a judgment had first been obtained against the company through one of its public officers. The decision of the Court of Queen's Bench was that the signature of Goddard, the manager, was in fact and law the signature of the banking company; but upon appeal to the Court of Exchequer, Lord COLERIDGE was of the opinion that the signature to the document upon which the bank was sought to be held liable was not signed by the party to be charged, and did not come within the terms of the statute. Instead of basing the decision upon that view of the law, however, he held that the decision of the Queen's Bench should be reversed upon the ground that upon the language of the correspondence there was no intention to consult the bank, but rather the manager thereof; and that the representation was made by Goddard himself of matters as to which he was pledging his personal knowledge only. Upon this ground the decision was concurred in by the remainder of the court. No American case is found which covers the point in question, but the tendency of the decisions in the states in which Lord TENTERDEN's act has been adopted has been to modify the protection which the statute affords to fraud by enforcing a strict construction of its provisions. Bush *v.* Sprague, 51 Mich. 41; s. c., 16 N. W. Rep. 222; Hodgin *v.* Bryant, 114 Ind. 401; s. c., 16 N. E. Rep. 815. * * * A corporation can sign instruments in writing only by an officer or officers empowered so to do. In the usual course of the corporation's business the act of signing is not the act of an agent but the act of the corporation itself. While formal documents are usually signed by the president and secretary, and further authenticated by the corporate seal, the corporation may, nevertheless, empower any officer to execute deeds or other instruments in writing. In banking corporations, most instruments in writing issued or indorsed by the bank are signed by the cashier. The letters of the bank, in its usual correspondence about business are often, if not generally, signed by him. In Morse on Banks and Banking (§ 162) it is said that it is the special duty of the cashier to conduct the correspondence of the bank. The name of the defendant bank stands at the head of both letters referred to in the complaint, and both are signed by the cashier, and his official title is appended. The question is not free from doubt, but I am inclined to the view that in a document of this kind, written under the circumstances detailed in the complaint, the signature of the cashier is the signature of the bank."

CHAPTER X.

OFFICERS OF BANKS.

§ 299. **Directors — their powers and duty.**— Directors of a bank may authorize one of their number to assign any securities belonging to the corporation.[1] The directors of a bank have authority to settle with its cashier, where his accounts exhibit a deficiency in the funds; and, if the directors be guilty of fraudulent conduct in the settlement made with him, the settlement would still be valid, where the cashier is not shown also to be guilty of fraud.[2] But if the cashier be guilty of fraud in connection with the settlement, the bank will not be concluded by it.[3] Directors of a bank have no authority to allow overdrafts.[4] The giving of compensation to a director by the board of direct-

[1] Northampton Bank *v.* Pepoon, (1874) 11 Mass. 288.

[2] Frankfort Bank *v.* Johnson, 24 Me. 490.

[3] Ibid.

[4] Market Street Bank *v.* Stumpe, (1876) 2 Mo. App. 545. As to powers of the directors of a bank, see Harper *v.* Calhoun, 7 How. (Miss.) 203; State *v.* Commercial Bank of Manchester, 6 Smedes & Marsh. (Miss.) 218; Commercial Bank of Manchester *v.* Bonner, 13 Smedes & Marsh. (Miss.) 649.

ors of a bank for extra services, though unlawful, will not expose the directors to liability if done in good faith and with the purest intention to benefit the bank.[1] A director of a bank receiving his compensation provided by law as a director cannot contract with the board of directors while he continues a member for compensation for extra services.[2] But a board of directors of a bank may compensate a member of the board for services rendered to the bank prior to his membership.[3] Where a director of a bank has received money by order of its board of directors, which is unauthorized by law, it may be recovered by the bank as so much received to its use.[4] A bank will be affected with the knowledge of one of its directors, who acts for it in discounting a note, that the note was procured by fraud.[5] Where the director having knowledge of the character of negotiable paper discounted by a bank simply recommends its discount, the bank will not be charged with his knowledge if the director does not control its discretion or discount the paper himself as an officer or agent of the bank.[6] The directors of banks are bound to constant activity and thorough acquaintance with the daily course of affairs and dealings of the institution. They are bound, in the absence, illness or negligence of the cashier, to perform any duty which belongs to him, and it is their duty to see that the duty is performed. They are bound in law to know the securities of the bank, its bills payable and bills receivable, maturity of its paper

[1] Godbold *v.* Branch Bank at Mobile, 11 Ala. 191.

[2] Branch Bank at Mobile *v.* Collins, (1845) 7 Ala. 95; Branch Bank at Mobile *v.* Scott, (1845) 7 Ala. 107. An order of a board of directors allowing a compensation of $1,000 cash to the members of the board constituting the real estate committee, has been held to be illegal and void in Branch Bank at Mobile *v.* Collins, (1845) 7 Ala. 95; Branch Bank at Mobile *v.* Scott, (1845) 7 Ala. 107.

[3] Branch Bank at Mobile *v.* Collins, (1845) 7 Ala. 95; Branch Bank at Mobile *v.* Scott, (1845) 7 Ala. 107.

[4] Branch Bank at Mobile *v.* Collins, (1845) 7 Ala. 95; Branch Bank at Mobile *v.* Scott. (1845) 7 Ala. 107.

[5] Security Bank *v.* Cushman, (1877) 121 Mass. 490. Under what circumstances a bank would not be affected by the knowledge of one of its directors in discounting a note, see Washington Bank *v.* Lewis, (1839) 22 Pick. (Mass.) 24. When notice to a director of facts affecting paper offered for discount is notice to the bank, see Clerks' Savings Bank *v.* Thomas, (1876) 2 Mo. App. 367. As to a notice to a bank director, or knowledge obtained by him while not engaged either officially or as an agent or attorney in the business of the bank, being inoperative as a notice to the bank, see Fairfield Savings Bank *v.* Chase, 72 Me. 226.

[6] Shaw *v.* Clark, 49 Mich. 384.

and who are the parties. And, in the absence of the cashier, they are bound to due diligence in perfecting the liability of all indorsers upon the paper of the bank.[1] The doctrine, that the directors of a bank are conclusively presumed to know the financial condition of the bank, its general business and its receipts and expenditures as shown by its regular books, is for the protection of third parties dealing with the bank and of the bank against the prejudicial action of any director, and cannot be invoked to uphold a wrong appropriation of moneys by the cashier or other officer, which appropriation may be made and also entered upon the books of the bank without the actual knowledge of the directors.[2] The sacrifice of the corporate property by officers of a bank for the purpose of passing a crisis in its affairs, can only be justified when the object is to protect the rights of the creditors and do equal justice to all the stockholders of the corporation. The act must not be for the exclusive benefit of a particular individual, especially if it be one to whom the management of the funds of the bank has been intrusted.[3] Where the obligations for loans held by a bank against its directors exceeded the limit prescribed by law, and the cashier to reduce them procured notes to be made and indorsed for his accommodation, and had them substituted and absolutely exchanged for notes indorsed by a director and discounted by the bank for his accommodation, the Supreme Court of New York held that the transaction, being in good faith and not a mere shift to present a temporary appearance of soundness, was legal and the new notes valid.[4] Directors of a bank under the Maine statutes are liable to a creditor of the bank suffering certain losses growing out of the official mismanagement of the directors. These directors are personally responsible for the official mismanagement only which may have occurred during the year for which they were to have been chosen and during which they have acted.

[1] Lane *v.* Bank of West Tennessee, 9 Heisk. (Tenn.) 419; Moses *v.* Ocoee Bank, 1 Lea (Tenn.), 398.

[2] First National Bank *v.* Drake, (1883) 29 Kans. 311. As to the diligence required of directors of a bank in acquiring knowledge of its business, and what negligence would render them liable for special deposits lost by the bank, see United Society of Shakers *v.* Underwood, (1873) 9 Bush (Ky.), 616.

[3] Gillet *v.* Moody, 3 N. Y. 479.

[4] Seneca County Bank *v.* Neass, (1848) 5 Denio, 329. As to loans of bank funds to directors, see Bank Commissioners *v.* Bank of Buffalo, (1837) 6 Paige Ch. 497.

They are personally answerable for ordinary neglect in their official business. But one board of directors cannot be made to answer for renewals of worthless paper discounted by a previous board.[1] In a rather recent case, an action by bill of the receiver of a national bank against its former directors and the representatives of such as were deceased, framed upon the theory of a breach by the defendants as directors "of their common-law duties as trustees of a financial corporation and of breaches of special restrictions and obligations of the National Banking Act," the questions of the management of the business of such institution and the liability of its directors have been fully considered in the main opinion by the majority of the Supreme Court of the United States, and the dissenting opinion of the minority. It appeared that the provisions of the by-laws were not observed, and that the management of the bank was left almost entirely to the officers. No exchange committee nor examination committee was appointed, and the meetings of the board were infrequent and perfunctory. For years prior to the failure, fourteen at least, the business of the bank had been conducted by the president. FULLER, Ch. J., speaking for the majority, said: "It is not contended that the defendants knowingly violated, or permitted the violation of, any of the provisions of the Banking Act, or that they were guilty of any dishonesty in administering the affairs of the bank, but it is charged that they did not diligently perform duties devolved upon them by the act. Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act, although if any director participated in or assented to any violation of the law by the board he would be individually liable. The corporation after the amendment of 1874 had power to carry on its business through its officers. And although no formal resolution authorized the president to transact the business, yet, in view of the practice of fourteen years or more, we think it must be held that he was duly authorized to do so. It does not follow that the

[1] Bank Mutual Redemption *v.* Hill, 56 Me. 385. That directors of a bank, after its insolvency, have no rights in equity to secure any advantage to themselves, see Roan *v.* Winn, (1887) 93 Mo. 503. As to liability of directors of a bank who may have allowed a bank to be damaged by wrongful acts of its president, see Smith *v.* Rathbun, 22 Hun, 150. As to liability of directors of a bank to depositors for their gross negligence and mismanagement, see Adams *v.* Manning, 10 W. N. C. (Pa.) 449.

executive officer should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. Whether they were responsible for any neglect of the board as such, or in failing to obtain proper action on its part is another question. Indeed, it is frankly stated by counsel that 'although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong-doing,' and section 556 of Morawetz on Corporations is cited, which is to the effect that 'the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability, but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed.' It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation, and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. Morawetz, § 551 *et seq.*, and cases. Bank directors are often styled trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as

creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to *cestui que trust*." After referring to the cases cited below,[1] the majority of the court applied, through the chief justice, these principles to the particular acts of particular ones of the directors charged in the bill with neglect and relieved them from liability as charged.[2] Four of the justices, however, dissented as to the acts of several of the directors.[3]

[1] Percy *v.* Millaudon, 8 Mart. (N. S.) (La.) 68; Spering's Appeal, 71 Pa. St. 11; Citizens' Building Association *v.* Coriell, 34 N. J. Eq. 383; Hodges *v.* New England Screw Co., 1 R. I. 312; Wakeman *v.* Dalley, 51 N. Y. 27.

[2] Briggs *v.* Spaulding, (1891) 141 U. S. 132.

[3] Ibid. Mr. Justice HARLAN, speaking for himself and GRAY, BREWER and BROWN, JJ., in the dissenting opinion, presented their conclusions in these words: "We are of opinion that when the act of congress declared that the affairs of a national banking association shall be 'managed' by its directors, and that the directors should take an oath to 'diligently and honestly administer' them, it was not intended that they should abdicate their functions and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by 'duly authorized officers or agents,' in respect to matters of current business and detail that may be properly intrusted to them by the directors. But, certainly, congress never contemplated that the duty of directors to manage and to administer the affairs of a national bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank choose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents. But the duty remains, as between the directors and those who are interested in the bank, to exercise proper diligence and supervision in respect to what may be done by its officers and agents. As to the degree of diligence and the extent of supervision to be exercised by directors, there can be no room for doubt, under the authorities. It is such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge." The justice, in support of the conclusions of the minority, quoted largely from many of the following cases, and cited the others: Martin *v.* Webb, 110 U. S. 7; Cutting *v.* Marlor, 78 N. Y. 454; Preston *v.* Prather, 137 U. S. 604; Hun *v.* Cary, 82 N. Y. 65; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Halsey *v.* Ackerman, 38 N. J. Eq. 501; United Society of Shakers *v.* Underwood, 9 Bush (Ky.), 609; Horn Silver Co. *v.* Ryan, 42 Minn. 196; United States *v.* Means, 42 Fed. Rep. 599; Delano *v.* Case, 121 Ill. 247; Percy *v.* Millaudon, 3 La. 568; Marshall *v.* F. & M. Savings Bank of Alexandria, etc., 85 Va. 676;

§ 300. Jurisdiction of state courts in cases of directors of national banks violating their duty.— This being a case against the directors of a national bank which, being insolvent and in the hands of the receiver, defendant here, the demurrer to the bill challenged the jurisdiction of the state court. To this it was said: "The right of action is not, in our opinion, derived from the act of congress, but depends upon general principles of equity, but in any aspect of the case, the state courts have concurrent jurisdiction, unless exclusive jurisdiction has been conferred upon the United States courts.[1] The jurisdiction of the state courts over actions against national banks is expressly recognized by the act, and such jurisdiction has been repeatedly exercised in actions by receivers to collect claims due to such banks. There can be no reason why civil actions brought by stockholders in place of the receiver, to enforce claims against delinquent directors or officers, should stand upon any different footing. The only cases in which exclusive jurisdiction is conferred, by the Banking Act, upon the courts of the United States, so far as we can find, are proceedings to enforce the forfeiture of the franchises of banking associations for violations of the act (§ 5239), and proceedings to enjoin the comptroller of the currency from winding up the corporation, through a receiver. There is nothing in the act which withdraws from the jurisdiction of the state courts civil actions to enforce rights of individuals against national banks or their officers.[2] Criminal prosecutions for offenses created by the act stand upon a different footing. Exclusive jurisdiction in such cases is vested in the Circuit and District Courts of the United States by the Judiciary Act of 1789." As to parties, it was also said: "The bank was a proper and even necessary party defendant. Robinson *v.* Smith, 3 Paige, 222. It continued to be a corporation, notwithstanding the appointment of a receiver, and the receiver may bring action in its name. Pahquioque Bk. *v.* Bethel Bk., 36 Conn. 325; Kennedy *v.* Gibson, 8

Building Fund Trustees *v.* Bosseiux, 3 Fed. Rep. 817; Charitable Corporation *v.* Sutton, 2 Atk. 400; Land Credit Co. of Ireland *v.* Lord Fermoy, L. R., 5 Ch. 763; Williams *v.* McKay, 40 N. J. Eq. 189.

[1] Citing Claflin *v.* Houseman, 93 U. S. 130; Robinson *v.* National Bank of Newberne, 81 N. Y. 385; National Bank of Gloversville *v.* Wells, 79 N. Y. 498; affirmed in the Supreme Court of the United States, January, 1882.

[2] Citing Cooke *v.* State Nat. Bank of Boston, 52 N. Y. 96; Bletz *v.* Columbia Nat. Bank, 87 Pa. St. 87.

Wall. 506; Green *v.* Walkill Nat. Bk., 7 Hun, 63; City of Lexington *v.* Butler, 14 Wall. 283; Bank *v.* Kennedy, 17 Wall. 19. The receiver was also a necessary party, as it was through him that the amount which might be adjudged against the directors was to be collected and paid over. The presence of both of these parties was necessary to a final determination of the controversy."[1]

§ 301. **Jurisdiction of courts of equity in such cases.**— The New York Court of Appeals has sustained the jurisdiction of courts of equity of suits to enforce the liability of directors of corporations growing out of a violation of their duties in allowing or promoting the waste of corporate funds, for instance. Upon this subject RAPALLO, J., for the court, said: "The liability of directors of corporations for violations of their duty or breaches of the trust committed to them, and the jurisdiction of courts of equity to afford redress to the corporation, and in proper cases to its shareholders, for such wrongs exist independently of any statute. By the Revised Statutes of New York (2 R. S. 462) it is declared that the chancellor has jurisdiction over directors, managers and other trustees, and officers of corporations, and to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge, and to compel payment by them to the corporation whom they represent, of all sums of money, and the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such trustees. These enactments are, however, merely declaratory of a jurisdiction long previously conceded to exist, both in this state and in England, and to them were added by further provisions of the Revised Statutes certain visitorial powers not before exercised by the Court of Chancery (except in cases of charitable bodies), viz., to restrain corporations from exceeding their corporate powers. This latter jurisdiction was that which the Court of Chancery disclaimed in the well-known case of The Attorney-General *v.* The Utica Ins. Co., 2 Johns. Ch. 389, with reference to which case the provisions of the Revised Statutes just referred to were framed. But, in that very case, jurisdiction in cases like the present was conceded

[1] Brinkerhoff *v.* Bostwick, (1882) 88 N. Y. 52, 60, 61.

to be inherent in the court, and in Robinson *v.* Smith, 3 Paige, 222, 233, the power is declared to exist independently of the provisions of the Revised Statutes, so far as the individual rights of stockholders are concerned, to call directors to account and make satisfaction for losses occasioned by breaches of their trust. This jurisdiction has been continually exercised in England and in this country, and is not of statutory origin. Angell & Ames on Corp. § 312, and cases cited."[1]

[1] Brinkerhoff *v.* Bostwick, (1882) 88 N. Y. 52, 58, 59. See, also, Brinckerhoff *v.* Bostwick, (1885) 99 N. Y. 185. As to how such actions may be brought, it was said in Brinkerhoff *v.* Bostwick, 88 N. Y. 52: "The action to recover such losses, as before observed, should in general be brought in the name of the corporation, but, if it refuses to prosecute, the stockholders, who are the real parties in interest, will be permitted to sue in their own names, making the corporation a defendant. Greaves *v.* Gouge, 69 N. Y. 154. And that course of proceeding is also allowed if it appears that the corporation is still under the control of those who must be made the defendants in the suit. See Butts *v.* Wood, 37 N. Y, 317; Robinson *v.* Smith, 3 Paige, 222. In such cases a demand upon the corporation to bring the suit would be manifestly futile and unnecessary. A suit prosecuted under the direction and control of the very parties against whom the misconduct is alleged, and a recovery is sought, would scarcely afford to the shareholders the remedy to which they are entitled, and the fact that the delinquent parties are still in control of the corporation is of itself sufficient to entitle the shareholders to sue in their own names. Hodges *v.* New England Screw Co., 1 R. I. 312; Heath *v.* Erie Railway Co., 8 Blatchf. 347. If they could not be permitted in such cases to assert their own rights in a court of equity, the directors so long as they remained in office could set them at defiance. In the present case the corporation cannot sue, because all its rights of action have been transferred by operation of law to the receiver. He certainly is not a proper person to whom to intrust the conduct of the action, even did he consent to institute it, or should the comptroller of the currency direct him so to do, for he is one of the parties charged with misconduct and against whom a remedy is sought. It necessarily follows that the shareholders must be permitted to sue in their own names, or the wrongs complained of must go without redress, and substantial rights be sacrificed to a mere matter of form. The shareholders are the parties whose interests are involved in the proceeding. If conducted in the name of the corporation or the receiver, it would be as their representative and for their benefit; and when, as in this case, sufficient reasons are shown why it cannot be effectually prosecuted in that form, the right of the shareholders to sue in their own names is sanctioned by principle and precedent. Where the shareholders are numerous, the suit may be brought by one or more in behalf of all." Butts *v.* Wood, 37 N. Y. 317; Robinson *v.* Smith, 3 Paige, 222; Hichens *v.* Congreve, 4 Russ. 562; Heath *v.* Erie Railway Co., 8 Blatchf. 347. More than sixty years ago Chancellor WALWORTH, of the Court of Chancery of New York, referring to the allega-

§ 302. Statutory liability of directors of national banks — actions to enforce it — rules.— The personal liability of directors of a national bank for violation of the Revised Statutes of the United States, section 5204, by declaring dividends in excess of net profits, and of section 5200 for loaning to separate persons, firms or corporations amounts exceeding one-tenth of the capital stock, cannot be enforced in an action at law.[1] Under the Revised Statutes of the United States, section 5239, providing that, if the directors of a national bank shall violate any of the provisions of the title relating to the organization and management of banks, the franchises of the bank shall be forfeited, such violation, however, to be determined by a proper court of the United States in

tions of the bill before him said: "If [they] are true, there is no doubt that the directors of this company were guilty of a most palpable violation of their duty, in engaging in this gambling speculation in stocks, which was wholly unauthorized by their charter, and which, the bill alleges, was carried on to subserve their own individual interests and purposes. I have no hesitation in declaring it as the law of this state that the directors of a moneyed or other joint-stock corporation, who willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good their loss. And they are equally liable, if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust." Robinson *v.* Smith, (1832) 3 Paige Ch. 222, 232. Adopting and approving this rule declared by Chancellor WALWORTH, the Court of Appeals has since held that a complaint charging the directors of a national bank with neglecting to perform their official duties as such directors, and negligently permitting the money, property and effects of the bank to be stolen, wasted and squandered; with negligently permitting various persons and corporations who were insolvent and irresponsible to overdraw their accounts to a large amount without security, and negligently permitting the money of the bank to be loaned to irresponsible persons and corporations, without adequate security, whereby said money was lost; with employing a cashier who was dishonest, unfaithful and incompetent, all of which was known to them; with neglecting to take and keep good and sufficient security for the performance of the duties of said cashier and of the president and other officers of the bank; and that they so negligently and carelessly conducted its affairs that its entire capital, surplus, property and effects were lost and the stock rendered worthless, and the stockholders were rendered liable for a large sum of money on account of the unpaid debts of the bank, stated a cause of action upon the personal liability of directors.

[1] Welles *v.* Graves, (1890) 41 Fed. Rep. 459, in accordance with the doctrine laid down in Hornor *v.* Henning, 93 U. S. 228. See Stone *v.* Chisolm, 113 U. S. 302; s. c., 5 Sup. Ct. Rep. 497.

a suit therefor by the comptroller, and that in cases of such violation every director participating therein shall be personally liable for all damages which the bank, its shareholders, or any other person shall have sustained in consequence thereof, the comptroller cannot authorize the receiver of any such bank to bring suit under section 5234 to enforce such personal liability until it has been adjudged by a proper court that such acts have been done as authorized a forfeiture of the charter.[1] Directors of a national bank have been held personally liable as provided by section 5239 of the Revised Statutes of the United States for damages sustained in consequence of excessive loans where they had assented to a loan in excess of the limit prescribed by section 5200 of the Revised Statutes of the United States, and subsequently retired paper representing a part of this loan by charging it against an illegal dividend, declared when the bad paper reckoned to make up an apparent surplus more than exceeded the capital stock, which transaction was invalid, the liability being fixed at the amount of the paper thus retired.[2] An action under the act of congress imposing a legal liability on the directors of a national bank for certain things which they do which shall result in an injury to the bank, its stockholders or creditors, and making them liable for the amount of the damages, survives against the estate of a director, the statute being a remedial and not a penal statute.[3] It is no defense to an action by the receiver of a bank against a director's estate, such bank director having made a wrongful loan of money from which loss occurred, that the insolvency of the person to whom the loan was made was not discovered until after the death of the director and the appointment of the receiver.[4] Directors of an insolvent national bank which has been placed in the hands of a receiver are not amenable to a suit by a stockholder in the bank to make them personally liable for the mismanagement of the bank, such right of action being in the receiver and not in the individual stockholder.[5] The receivers of a railroad company in Texas had

[1] Welles *v.* Graves, (1890) 41 Fed. Rep. 459. See Kennedy *v.* Gibson, 8 Wall. 498.

[2] Witters *v.* Sowles, (1890) 43 Fed. Rep. 405.

[3] Stephens *v.* Overstolz, (1890) 43 Fed. Rep. 465.

[4] Ibid.

[5] Howe *v.* Barney, (1891) 45 Fed. Rep. 668. In National Exchange Bank of Baltimore *v.* Peters, (1890) 44 Fed. Rep. 13, Hughes, Circuit Judge, referring first to the statutes, discussed this question elaborately as follows:

under the orders of the federal court appointing them deposited large amounts of money in a bank in that state. This bank became insolvent and its affairs were in the hands of a receiver appointed by a state court. The balance of funds due receivers on their deposit account not being paid on demand, they petitioned the court appointing them, alleging a conspiracy on the part of several officers of that bank to misappropriate the funds,

"Thus the statute law makes directors of a national bank liable in damages for violations of their duty, or negligence or malfeasance as directors, and prescribes how they shall be subjected to liability. Being liable in damages, they are amenable to suit for damages in a jury proceeding, and not, I infer, to suit in any other form, whether at law or in equity. But even if they were amenable to liability in a proceeding not sounding in damages, then, the damages recoverable being an asset of the bank, the statute law empowers and requires the receiver of the injured bank, under the direction of the comptroller, and him alone, to sue the claim. Except the receiver, the statute law nowhere authorizes suit to be brought by any person not in privity against directors of national banks. The bill of complaint under consideration has, therefore, no sanction in respect to its party plaintiff from the statute law of the land. Does it present a case in which equity, in the exercise of a high prerogative to which it feels at liberty sometimes to resort, will relieve against the rule of privity, and entertain this suit, though brought by a plaintiff otherwise incompetent to sue? Certainly the bill contains nothing on its face to require or to justify such a recourse. Exceptional authority to sue is given only in the rare cases in which those legally competent to sue wrongfully refuse to do so. When such a case is presented, equity will sometimes authorize and direct suit to be brought by some other plaintiff whom it may approve. As before said, whatever is claimed in the suit at bar would be an asset in the hands of the receiver if recovered, and the statute law imposes upon him the duty of suing for it, under the comptroller's direction. But this bill contains no allegation either that complainant called upon the comptroller to direct the receiver to sue, and he refused, or that the receiver himself was called upon and refused. Containing no such allegation, the bill makes no case for a suit by a person other than the receiver. Nor would it follow, even if such an application had been made and refused, and the fact had been only alleged in the bill, that this suit could be maintained, for in cases where directors of national banks have violated or negligently permitted the violation of the laws regulating those banks, the statute law seems to require that the question of violation shall be judicially determined in a proper court of the United States, in a suit instituted in his own name by the comptroller for that specific purpose, before the liability can attach to the directors; and, therefore, it would seem that directors cannot be pursued individually for such violation until after such an adjudication thus obtained. So that if the receiver and the comptroller, though called upon to sue the defendants in this suit, had refused to do so, even the allegation of such application and refusal would have been insufficient ground of authority for bringing this suit. I am of the opinion that the provisions of the National Banking

the making of securities to themselves for alleged personal debts against the bank and the appointment of a receiver, and asked that these officers of the bank be punished as in contempt of the court. The rule for contempt was discharged, but an order was laid upon the receivers to institute such proceedings as might be necessary to make the respondents individually and collectively liable for all the funds wrongfully obtained from and withheld from the receivers.[1]

Act enter as part into the contracts of creditors with the national banks, and that those provisions which define the liability of directors, and prescribe the proceedings to be taken against them, when guilty of violations of the act, are exclusive of other liability and other proceedings; and that it is not within the prerogative of equity to authorize a disregard of the provisions of the National Banking Act, defining such liability and prescribing such proceedings." See, on this point, Smith *v.* Hurd, 12 Met. 371; Craig *v.* Gregg, 83 Pa. St. 19; Allen *v.* Curtis, 26 Conn. 455; Evans *v.* Brandon, 53 Tex. 56. As to the circumstances under which a stockholder may bring such actions, see Robinson *v.* Smith, 3 Paige, 222; Brinkerhoff *v.* Bostwick, 88 N. Y. 52; Smith *v.* Poor, 40 Me. 415; Carter *v.* Glass Co., 85 Ind. 180. As to the avails of such litigation by stockholder going to the corporation and being a part of its means, see Dewing *v.* Perdicaries, 96 U. S. 193, 197, 198.

[1] Southern Development Co. *v.* Houston & Texas Central Ry. Co., (1886) 27 Fed. Rep. 344. PARDEE, J., said: "Counsel for the receivers contend that the effect of the order of court designating the bank as one of the depositories of the receivers, and the acceptance by the bank of the receivers' deposits. was to make the bank and its officers officers of the court, and, therefore, directly responsible to the court for misapproprtation of the moneys deposited by the receivers under the order of court." He then said: "The adjudged cases on this point brought to the attention of the court are unsatisfactory. The statement in Rapalje on Contempts (§ 15) that 'a private corporation made the depository of the funds of the court, is an officer of the court, within the power of the court to punish by contempt process for misconduct,' is supported by a dictum of the Supreme Court of Illinois in the case of In re Western Marine & Fire Ins. Co., 38 Ill. 289, in which case it is said 'When a court makes an order appointing a particular person a depositary of the court funds, and such person, knowing of such order, accepts the deposit, he unquestionably becomes *pro hac vice* an officer of the court. The court may order him to refund the money, and if he fails to do so, *without showing some valid reason,* may proceed against him as for a contempt. The same rule would apply to a corporation, and if its officers, *having control of its funds, and having the means of payment belonging to the corporation in their hands,* should refuse to pay, they might be proceeded against as for a contempt.' It will be noticed by the foregoing that officials of a corporation delinquent as a depository are to be held as in case of contempt when they have control of its funds and have the means of payment belonging to the corporation in their hands. * * * In the present

§ 303. President — his power and duty.— The executive officers of a bank, its president and cashier, are presumed to have authority to direct the application of any funds in the bank to its debts.[1] An official indorsement of a note payable at a bank by its president will bind the bank.[2] A president of a bank must be authorized by the board of directors, or he will not be authorized to execute a warrant of attorney to institute a suit.[3] Should a president of a bank receive stock of the bank in payment for a note made payable to the bank in its stock, he would hold the stock for the bank as its property.[4] It has been held in Vermont that the president of a bank had the right in behalf of the bank, and without special authority, to agree with the makers of a note, payable to and at the bank, upon an agent to receive money upon the note at some other place, and to forward it to the bank; and that such agency might be proved by parol.[5] A bank will be

case I think that it is somewhat doubtful whether the funds deposited by the complaining receivers with the [insolvent bank] under the aforesaid order of court, were strictly court funds or could be considered as moneys paid into court. By the orders appointing them, the complainants, as joint receivers, were authorized and directed to carry on and operate the railways and property of the [railway corporation in their hands]; and such carrying on and operating contemplated and required the handling, receiving and paying out of money, the payment and collection of bills and the transaction of such financial business as would require the medium of and accommodation of banks. In the transaction of this business, moneys were not deposited as special funds to be drawn out on order of the court, but were deposited, generally, to the credit of the receivers, and to be handled and used by the bank like the deposits of its other patrons in a banking, loan and discount business. And it may be further noticed that the respondents have not the possession of the funds of the bank nor means in their hands belonging to the bank, the possession of [one of the respondents], as receiver, being that of the [Texas court appointing him]. So that if we take the law to be as broad as declared by the Supreme Court of Illinois, in the Western Marine & Fire Ins. Co. case, it is not broad enough to meet the necessities of this case; for if it is conceded that the [insolvent bank], by designation of the court and by acceptance, became an officer of the court, and that the funds deposited therein were court funds, and that, therefore, the bank is liable for misconduct in misappropriating such funds, as in cases of contempt, there is neither reason nor authority for considering that each servant or agent of the bank also became *pro hac vice* an officer of the court, and, therefore, amenable to the court, as in case of contempt for misconduct in dealing with the *bank* funds."

[1] City Bank *v.* Bateman, 7 H. & J. (Md.) 104.

[2] Aiken *v.* Marine Bank, 16 Wis. 679.

[3] Bank *v.* Keim, 10 Phil. 311.

[4] Markley *v.* Rhodes, 59 Iowa, 57.

[5] National Bank *v.* Strait, 58 Vt. 448.

bound by whatever its president may do in taking a new note for matured paper, so far as it is within the apparent scope of his authority.[1] The president of a bank cannot make a valid contract to pay for obtaining depositors.[2] A president of a bank, when discounting paper for the bank, has no authority to promise the holder that he need not pay it.[3] Neither the president nor cashier of a bank organized under the laws of Kansas has the power, *virtute officii*, to sell the safe of the bank for a debt of the bank.[4] A contract made by a president of a national bank for the bank to act as agent in the purchase of bonds or stocks, as the bank has no such power, would be *ultra vires* and not binding upon the bank.[5] Notice to the president of a bank is notice to the bank.[6] A bank will be affected with notice of knowledge acquired by its president in the course of its business that money deposited by a depositor in his individual account belongs to an estate of which he may have control, for instance, as assignee for the benefit of creditors; and the money deposited by him cannot be appropriated by the bank to the payment of his notes. Payments thus made could be recovered from the bank by the assignee.[7] Where the cashier of a national bank in the usual course of business takes a note before its maturity without notice or knowledge of any defense to the note, the knowledge of the president of the bank that there was claimed to be a failure of consideration would be no notice to the bank of that fact.[8] It would be a breach of duty for a president of a bank to allow a customer of the bank to take away its securities for inspection, and he and his sureties would be liable for the results of such an act on his part without regard to the question of good faith.[9]

[1] Cake *v.* Bank, 116 Pa. St. 264.

[2] Tifft *v.* Bank, 8 Pa. Co. Ct. Rep. 606.

[3] First National Bank of Whitehall *v.* Tisdale, (1879) 84 N. Y. 655.

[4] Asher *v.* Sutton, (1884) 31 Kans. 286.

[5] Bank *v.* Hoch, 89 Pa. St. 324.

[6] Savings Bank *v.* Holt, 58 Vt. 166.

[7] Bank *v.* Peisert, 2 Pennypacker (Pa.), 278.

[8] First National Bank *v.* Sherburne, 14 Bradw. (Ill.) 566. Bank chargeable with notice of facts within the official knowledge of its president. Union Bank *v.* Wando Mining & Mfg. Co., 17 S. C. 361. Under what circumstances one who may have compromised a claim and given a release to the bank may avoid that release by reason of the falsity of a president's statement, see Gould *v.* Cayuga County National Bank, (1877) 56 How. Pr. 505. That a president of a bank has no authority to release debts, see Olney *v.* Chadsey, 7 R. I. 224.

[9] Bank *v.* Wiegand, 5 W. N. C. (Pa.) 12.

An overdraft on a bank, if made without authority, is a fraud upon the part of the drawer; if suggested, countenanced, connived at and allowed by the president of a bank, without any authority of the directors, it would be a fraud on the part of the president, and he will be held liable personally for the damages to the bank.[1] In a Kansas case it appeared that one, at the same time stockholder, director and vice-president of a savings bank, sold his stock in the bank, while it was in an embarrassed condition, to an outside party who had no funds in the bank, but, on the contrary, had an overdrawn account with the bank of several months' standing, from whom he received a check on the bank in payment for the stock for $2,100. This outside party then sold the stock to the cashier of the bank, who purchased it for the bank, but had no authority from the bank or from any one else to make such purchase. The cashier then gave to this outside party a credit for the stock of $2,100 on the books of the bank, and on the same day gave the vice-president of the bank, who had sold this stock, a credit on the books of the bank for the amount of the check drawn by the outside party, and charged the latter with a like amount. A few days afterwards the vice-president drew the amount out of the bank. The Supreme Court of that state held that the bank could maintain its action against this officer for the amount of money so withdrawn from the bank.[2] As to the duty of officers of the bank, it was held by the court that a director, having personal and private dealings with his bank, was bound to know (so far as the same affected his own personal dealings) the general condition and management of his bank, and everything of importance that occurred therein, either at the time it occurred or soon thereafter. Further, it was held that this officer, the vice-president, was bound to know when his

[1] Oakland Bank of Savings *v.* Wilcox, (1882) 60 Cal. 126. See, on the subject of personal liability of officers, Leffman *v.* Flanigan, 5 Phila. 155; Shea *v.* Mabry, 1 Lea (Tenn.), 319; Minor *v.* Mechanics' Bank, 1 Pet. 72; Eichelberger *v.* Finley, 7 Har. & J. (Md.) 387; Bank of St. Mary's *v.* Calder, 3 Strobh. (S. C.) 408; Lancaster Bank *v.* Woodward, 18 Pa. St. 362; Shear *v.* K. & K. R. R. Co., 6 Bax. (Tenn.) 278. In First National Bank *v.* Reed, 36 Mich. 263, the president of the bank was held personally liable for moneys paid out by the cashier under his directions and without security to one who was supposed to be irresponsible, with whom the president was interested in the business for which the money was obtained, these payments having been kept from the knowledge of the directors.

[2] German Savings Bank *v.* Wulfekuhler, (1877) 19 Kans. 60.

bank was in an embarrassed condition, and the condition of an account which had been overdrawn for months; and that where the cashier had given a credit to the person having such overdrawn account, for an insufficient and illegal consideration, the officer was bound to know the same within less than several days thereafter.[1]

§ 304. President's acts binding on bank — illustrations.— In an action by a receiver of an insolvent national bank against a correspondent bank to recover the amount of a deposit by the insolvent bank with this correspondent, where the evidence showed that the board of directors left it to the president, as the agent of the bank, to negotiate loans, and to make such contracts as to repayment and security as were lawful and usual, the United States Circuit Court for the southern district of New York held that the evidence was sufficient to establish the authority of the president to pledge the deposit with the correspondent bank as security for loans by it to the insolvent bank.[2] This was an action by the receiver of a national bank against the makers of a note found among its assets. The defense of the makers was that there was no consideration towards them; that it was an accommodation note made by them at the instance of the president of the bank, to be used for the purposes of the bank. The note was made payable to the order of the makers and indorsed by them. On the trial the note clerk of the bank testified to entries on the discount book indicating that the note was discounted on a certain day, and that the account of the proceeds was handed to the president of the bank, who put his signature upon it, thus making it an order on the teller for the amount therein stated; that this order was returned to the clerk, together with the president's own check for an amount sufficient to make up the face of the note, and that this amount was used to pay a former note of

[1] Ibid.

[2] Bell *v.* Hanover Nat. Bank, (1893) 57 Fed. Rep. 821. LACOMBE, Circuit Judge, said: "It is true that no express authority from the board of directors to make such an agreement is shown, but the contract is not an unusual one, and authority to make it may be established by proof of the course of business, by the usages and practice which the directors may have permitted to grow up in the business of the bank, and by the knowledge which the board of directors must be presumed to have had of the acts and doings of its subordinates in and about the affairs of the corporation. Mahoney Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 194."

the makers. As to the former note, he testified to entries on the discount book indicating that it had been discounted, and that the proceeds were deposited to the credit of the president of the bank. The bank a short time afterwards became insolvent. The United States Circuit Court of Appeals for the third circuit held that this testimony did not sufficiently show the bank to be a *bona fide* holder for value, as against the defense that the notes were procured from the makers by the president, who was also the managing officer of the bank, by fraud and without consideration. They also held that it was error to refuse to allow the makers to show that the note in suit, and the former notes which were renewed by it, were given at the solicitation of the president, who, in the actual conduct of the business of the bank, was its sole managing officer, and upon his execution of a receipt which was also offered in evidence reciting that the note was for the use of the bank, and was to be paid by it at maturity; and that he stated that he proposed to use it in the clearing house, as it would look better for the credit of the bank than numerous small notes which it held, and which small notes it would retain to protect this note of the makers, as the facts, if shown, would make a valid defense to the action. It was also held to be error to refuse the defendant's offer to show that the president was the sole managing officer of the bank, in the actual conduct of the business, and that the cashier occupied more the position of a clerk than that of actual cashier; for, if the president exercised the functions of cashier and was the sole managing officer of the bank, he had authority to borrow money for the use of the bank in the regular course of its business.[1] One intending to purchase bank-

[1] Simons *v.* Fisher, (1893) 55 Fed. Rep. 905 (BUTLER, D. J., dissenting). ACHESON, Circuit Judge, in the opinion of the majority of the court, referred to the case of Coats *v.* Donnell, 94 N. Y. 168, 176, as having features very like the case before the court. He said: "The cashier of a bank [in that case] orally agreed with a firm that if the latter would receipt certain drafts negotiated by the bank it would keep on deposit with the firm until their maturity a balance equal to the amount of the drafts, upon which the firm should have a lien; the firm to be kept informed of the condition of the bank, which the cashier stated to be embarrassed, but, with certain expected aid, able to continue business. The agreement was held to be valid, and within the power of the cashier to make, both under his general authority and by virtue of a by-law which gave him supervision of the bank, with the duty to attend to the making of loans, discounts and other active business transactions of the bank." It was said in Coats *v.* Donnell, *supra*: "The cashier

stock is entitled to rely upon a statement of its president as to the bank's condition, without inquiring further.[1]

§ 305. President's acts not binding on bank — illustrations.— The Nebraska Supreme Court has, in an action against a national bank to recover the amount of a subscription made in its name by the president of the bank to encourage and aid the erection of a paper mill, affirmed the judgment of the trial court instructing the jury to return a verdict for the bank.[2] The president of a national bank in Wyoming arranged with bankers in New York to credit his bank with $10,000, with the under-

of a bank is its executive officer, and it is well settled that as an incident of his office he has authority, implied from his official designation as cashier, to borrow money for and to bind the bank for its repayment; and the assumption of such authority by the cashier will conclude the bank as against third persons, who have no notice of his want of authority in the particular transaction, and deal with him on the basis of its existence."

[1] Merrill *v.* Florida Land & Imp. Co., (1893) 60 Fed. Rep. 17.

[2] Robertson *v.* Buffalo County National Bank, (Neb. 1894) 58 N. W. Rep. 715. The court said: "The undisputed evidence in the case is that the president of the bank, without the knowledge or consent of the directory, signed the name of the bank to the subscription paper, and that the directory of the bank had never ratified this act of the president. Whether the court erred in instructing the jury to return a verdict for the bank depends, then, upon the question as to whether the bank is bound by the subscription made by its president. This bank was organized under the act of congress for the purpose of lending money, receiving deposits and for the conducting of a general banking business. The making of donations of its funds or capital to aid in the building of paper mills, canals or churches is no part of the business for which it was incorporated. The bank — that is, the corporation — by the unanimous consent of its stockholders, might, no doubt, make such donation of its capital to any enterprise or person it chose; but is the bank bound by a contract made in its name by its president, in and by which it is agreed to donate to some person or enterprise a part of its capital? A large part of the argument of counsel in this court has been directed to the doctrine of *ultra vires*, but we do not think that it is necessary to invoke that doctrine in order to reach a correct decision in this case. It seems to us that this question is one of agency. The bank is the principal and the president of the bank was its agent, and the bank, of course, was bound by the acts of its president, done within the scope of his authority. In Morawetz on Private Corporations (§ 423) it is said: 'The property and funds of a corporation belong to its stockholders, and cannot be devoted to any use which is not in accordance with their chartered purposes, except by unanimous consent. No agent of a corporation has implied authority to give away any portion of the corporate property or to create a corporate obligation gratuitously.' In Jones *v.* Morrison, 31 Minn. 140; s. c., 16 N. W. Rep. 854, it is said: 'The directors of a

standing that the bank would not draw against it, and had the New York bankers charged with the amount, and his own personal account with his bank credited with the amount, placing with the New York bankers his individual note for discount for the same amount. He then was allowed to overdraw his individual account afterwards, and then authorized the New York bankers to charge the amount of his individual note to his bank, which they did. The bank becoming insolvent, the receiver brought his action against the New York bankers for the amount. The United States Circuit Court of Appeals for the second circuit held that unless expressly authorized to do so the president of the bank could not use the funds of the bank to pay his personal obligations; and, there being no proof of such express authority, that he authorized the New York bankers to do so was not a defense to the suit.[1]

corporation have no authority to appropriate its funds in paying claims which the corporation is under no legal or moral obligation to pay, as to pay for past services which have been rendered and paid for at a fixed salary previously agreed on, or under a previous agreement that there should be no compensation for them.' To the same effect see Salem Bank *v.* Gloucester Bank, 17 Mass. 29; Bissell *v.* City of Kankakee, 64 Ill. 249; Minor *v.* Bank, 1 Pet. 46; Case *v.* Bank, 100 U. S. 446. In Alexander *v.* Cauldwell, 83 N. Y. 480, it is said. 'One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority. The corporation is only bound by their acts and contracts which are within the scope of their authority.' In Rich *v.* Bank, 7 Neb. 201, it is said in the syllabus: 'No officer of a bank can bind it by a promise to pay a debt which the corporation does not owe and was not liable to pay, unless the bank authorizes or has ratified the act; but ratification is equivalent to original authority to act in the matter, and the corporations are bound in the same manner as natural persons.' We think these authorities are decisive of the case at bar. This is not a case in which the bank has received and retains the fruits of an unauthorized contract made by its agent." For an illustration of what kind of a contract made by the director of a bank, specially delegated to take charge of the matter, and who acted under the direct advice of the president of the bank, would be binding upon the bank, see Waxahachie Nat. Bank *v.* Vickery, (Tex. 1894) 26 S. W. Rep. 876.

[1] Chrystie *v.* Foster, (1894) 61 Fed. Rep. 551. WALLACE, Circuit Judge, said: "While it may be conjectured, in view of the character of [the president's] relations with the bank, that it would have permitted him at any time to overdraw his account, there is no evidence that it did not rely upon the credit [given it by the New York bankers] in its subsequent dealings [with the president], and the presumption is that the notice given by the defendants influenced the bank as they intended it should. The authorization to the defendants by [the president], in his official capacity as president of

§ 306. When a bank is not chargeable with constructive notice as to knowledge of its president.— This was an action against a bank brought by the grantor of an undivided half interest in a city lot by a full conveyance of title to one who was the owner of the other undivided half interest in the lot, at the time the president of the bank, and who had subsequently, for a valuable consideration, conveyed the whole lot to the bank for its uses, to enforce the vendor's lien upon the undivided half interest conveyed by him. It appeared that the bank knew nothing of the transaction between this vendor and its president beyond the deed of full conveyance from the grantor to the president. The United States Circuit Court of Appeals for the fifth circuit held that the bank acquiring its title by conveyance from one who held the interest in the lot under a deed reciting full payment of the purchase money, and having no actual knowledge that the purchase money was not in fact paid, was an innocent purchaser without notice, and was not chargeable with constructive notice because of the knowledge of its president. As to what did appear from the evidence that the grantor had a conversation with a director of the bank, in which he stated that he was willing to convey his half interest in the lot to the president of the bank, with the understanding that the president was to convey the whole lot to the bank, and that the president of the bank was to pay him by giving him credit upon notes then running against him in the bank, the court held that it did not amount to notice to the director that the grantor intended to retain a vendor's lien, but rather imputed a notice that no such lien was to be retained.[1]

the bank, to apply the fund in their hands belonging to the bank in payment of his note, does not protect the defendants. It is not pretended that [the president] had any express authority to apply the funds of the bank to the payment of his own note. He had no implied authority to do so. There are no presumptions in favor of such a delegation of power. He who assumes to rely upon the authority of an agent to bind his principal to the discharge of the agent's own obligation must have actual authority if contest arises. No principle of the law of agency is better settled than that no person can act as agent of another in making a contract for himself. West St. Louis Sav. Bank *v.* Shawnee Co. Bank, 95 U. S. 557; National Park Bank *v.* German-American Mut. Warehousing & Security Co., 116 N. Y. 281; s. c., 22 N. E. Rep. 567; Anderson *v.* Kissam, 35 Fed. Rep. 699. If [the president] had used his note with the defendants to procure an advance to the bank for its benefit, and not for his own, and had given them such an authorization, very different questions would be presented from those which are now in the case."

[1] First Nat. Bank of Sheffield *v.* Tompkins, (1893) 57 Fed. Rep. 20.

§ 307. Cashier — his power and duty.— The cashier of a bank is the executive officer or agent of its financial department, and, in all the duties imposed upon him by law or usage as

PARDEE, Circuit Judge, referred in support of the court's ruling to certain cases in these words: "In the case of Whelan *v.* McCreary, 64 Ala. 319, Mr. Chief Justice BRICKELL, speaking for the court, declared the law of Alabama as follows: 'Whoever gives value, or enters into transactions by which his position is materially changed, and from which change loss must ensue, on the faith that the vendor of real estate, or person with whom he deals, has, as the title papers exhibit, a clear legal title, will be protected against outstanding and latent equities, of which he has no notice. A mortgagor taking a security for a contemporaneous loan or advance falls within the rule and is entitled to protection. Boyd *v.* Beck, 29 Ala. 713; Wells *v.* Morrow, 38 Ala. 125. The only notice, actual or constructive, of Mrs. Whelan's equity, which is attributed to the insurance company, is imputed, because notice, it is insisted, is traced to Williams, one of its directors, active and instrumental in making the loan to Cunningham and McCreary, and taking the mortgage. Whatever facts may have been known to Williams which ought to have excited inquiry on his part, came to his knowledge while he was acting as the agent of Cunningham, in a transaction in which the insurance company had no interest. The rule is settled in this state that a corporation will not be affected by notice which one of its directors or other officers may have received when not acting for the corporation, but in the transaction of his own private affairs, and under such circumstances that its communication to other officers of the company is not to be expected. Terrell *v.* Bank, 12 Ala. 502. If the facts were stronger for the imputation of notice to Williams than are found in the record, notice should not be imputed to the insurance company.' The case of Barnes *v.* Gas Light Co., 27 N. J. Eq. 33–37, involved a question in regard to notice very similar to the case in hand, and the chancellor held as follows: 'That the defendants are *bona fide* purchasers for valuable consideration is not denied. Their title is not impugned, except on the ground of notice, and the claim to relief is based on the allegation that at the time when the conveyance was made by Mr. Potts to them he was their president, and this fact is relied upon as of itself sufficient to establish notice to them of all the facts which the bill charges were within his knowledge. The general proposition is undoubtedly true that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal. Story Ag. § 140. On principles of public policy the knowledge of the agent is imputed to the principal. But the rule does not apply to a transaction such as that under consideration, for, in such a transaction, the officer, in making the sale and conveyance, stands as a stranger to the company. Stratton *v.* Allen, 16 N. J. Eq. 229. His interest is opposed to theirs, and the presumption is not that he will communicate his knowledge of any secret impurity of the title to the corporation, but that he will conceal it. Where an officer of a corporation is thus dealing with them in his own

such cashier, he acts for the bank and speaks for it.[1] A cashier, in the absence of all positive and known restrictions, possesses the incidental authority, and it is his duty to apply the negotiable funds of a bank as well as the moneyed capital to the discharge

interest, opposed to theirs, he must be held not to represent them in the transaction, so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys,' citing in support of the same Bank *v.* Cunningham, 24 Pick. 270; Kennedy *v.* Green, 3 Mylne & K. 699; In re European Bank, L. R , 5 Ch. App. 358; In re Marseilles Extension Railway Co., L. R., 7 Ch. App. 161; Winchester *v.* Railroad Co., 4 Md. 231. In Commercial Bank of Danville *v.* Burgwyn, (1892) 110 N. C. 267, certain promissory notes were indorsed to a corporation and by its president indorsed for value to a bank some months before they were due. The president of the corporation was a director of the bank and in the matter of discounting these notes had spoken to the president of the bank, who ordered them discounted, but this director, the president of the corporation, took no action in the matter of the discounting of the note. In this action by the bank upon the note it was claimed that the note was subject to a certain equity or set-off of the maker, on the ground that the president of the corporation knew it had notice of the impurity of the note, and, being a director of the bank, notice to him was notice to the bank. The Supreme Court of North Carolina said: 'That conceding * * * that if the director of the bank had such notice at the time of the discounting of all of the notes, it is well established that the plaintiff [the bank] cannot be affected therewith unless [he] was acting in his official capacity for the plaintiff in the said discounting transactions. The foundation principle upon which rests the doctrine that a party, whether an individual or a corporation, is chargeable with notice imparted to his agents in the line of their duty, is that agents are presumed to communicate all such information to their principals because it is their duty so to do. The principal is conclusively presumed to know whatever his agent knows, if the latter knows it as agent. Of course no such presumption can exist where the agent is dealing with the corporation in the particular transaction in his own behalf.' In such transactions the attitude of the agent is one of hostility to the principal. He is dealing at arm's length, and it would be absurd to suppose that he would communicate to the principal any facts within his private knowledge affecting the subject of his dealing unless it would be his duty to do so, if he were wholly unconnected with the principal. As was said by the court in Wickersham *v.* Chicago Zinc Co., 18 Kans. 481: 'Neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself and deals with the corporation as if he had no official relations with it,' or, as was said in Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33: 'His interest is opposed to that of the corporation, and the presumption is not that he will

[1] Ellicott *v.* Barnes, (1884) 31 Kans. 172; Lane *v.* Bank of West Tennessee, 9 Heisk. 419; Maxwell *v.* Planters' Bank, 10 Humph. 507; United States *v.* City Bank of Columbus, 21 How. 364.

of the bank's debts and obligations.[1] The power of a cashier to purchase for the bank is not implied from his office as cashier.[2] A bank will be bound by the agreement of its cashier to extend paper.[3] A statement by its cashier, upon inquiry of one known by him to be a surety on a note due the bank, that the note had been paid, with the intention that the surety should rely upon the statement, and the surety does so, and in consequence change his position by giving up securities or indorsing other notes for the same principal or the like, will estop a bank from denying that the note was paid.[4] The cashier of a bank, without special authority, cannot bind it by an official indorsement of his personal note. In an action on such a note the onus would be upon the payee to show the cashier's authority.[5] A bank has been held

communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it.' This doctrine has been applied to the case of a director procuring the discount of a note for his own benefit, having knowledge that it is founded upon an illegal consideration (Bank *v.* Christopher, 40 N. J. L. 435), or that it was made for his accommodation (Bank *v.* Cunningham, 24 Pick. 270), or that it was obtained upon a false pretense of having it discounted for the maker (Washington *v.* Lewis, 22 Pick. 24), or that it was affected in his hands with certain conditions (Louisiana State Bank *v.* Senecal, 13 La. 525), or with a claim of recoupment of which the bank had no notice (Loomis *v.* Bank, 1 Disney, 285), or with other equities. Savings Bank *v.* Hamlin, 125 Mass. 506. To the same effect are Corcoran *v.* Snow Cattle Co., 151 Mass. 74; Innerarity *v.* Bank, 139 Mass. 332; Stevenson *v.* Bay City, 26 Mich. 44; Frost *v.* Belmont, 6 Allen, 163, and other cases. In the foregoing decisions the director was not acting in his official character in the particular transaction, but had he been so acting, the bank by a great preponderance of authority would have been affected by his knowledge."

[1] Maxwell *v.* Planters' Bank, (1850) 10 Humph. (Tenn.) 507.

[2] Lionberger *v.* Mayer, (1882) 12 Mo. App. 575. As to the acts of a cashier, within the sphere of his duties, being the acts of a bank, see Burnham *v.* Webster, 19 Me. 232; Medomak Bank *v.* Curtis, 24 Me. 36; Warren *v.* Gilman, 17 Me. 360; Farrar *v.* Gilman, 19 Me. 440; Badger *v.* Bank of Cumberland, 26 Me. 428; National Bank of Metropolis *v.* Williams, 46 Mo. 17. As to the authority of cashiers of banks, see Caldwell *v.* National Mohawk Valley Bank, 64 Barb. 333; Chemical National Bank *v.* Kohner, 8 Daly, 530. As to powers habitually exercised by a cashier with the knowledge and acquiescence of the bank, see Merchants' Bank *v.* State Bank, 10 Wall. 604.

[3] Wakefield Bank *v.* Truesdell, 55 Barb. 602.

[4] Cocheco National Bank *v.* Haskell, 51 N. H. 116.

[5] West St. Louis Sav. Bank *v.* Shawnee County Bank, (1874) 3 Dill. 403; affirmed in 95 U. S. 557. In Houghton *v.* First National Bank of Elkhorn, 26 Wis. 663, the bank was held to be bound by its cashier's indorsement of his name followed by the abbreviation "Cas." on the negotiable note of another, though not done at the bank, or for its benefit, and by his statement to a purchaser that such statement was all right. As to pay-

not responsible to the real owner for money paid out with his consent to the administrator of the apparent owner, the one who had deposited it, even though his consent had been given upon the advice of the bank's cashier.[1] A bank will be bound by representations made by its cashier in the ordinary course of business as to the payment of a note in the bank, upon the faith of which the maker of the note may have acted.[2] It may be shown by parol that a check signed by one who is the cashier of a bank in his own name only is the check of the bank.[3] The assignee of a bank, it has been held, could not recover the securities delivered by a cashier as collateral for money borrowed on the bank's note from the lender.[4] Receiving offers for purchase of securities held by a bank, and a statement whether or not the bank owns securities in its possession, are within the scope of the general authority of its cashier.[5] The act of a cashier in certifying a check given as collateral security for the delivery of oil, "good when properly indorsed," has been held not to have rendered the bank liable, as his act was outside his proper powers and duties.[6] Evidence of the custom of bankers where a bank is located to borrow money on time is competent in an action against bankers upon a note given by their cashier for money borrowed which he may have appropriated to his own use, as tending to show that the act was within the scope of the ordinary and customary business of the bankers.[7] A bank is not exonerated from its liability for money borrowed by the fact that its cashier may have given his own note for money borrowed by him for the bank.[8] The provisions in the charters of certain banks in Georgia requiring all contracts whatever to be signed by the president and countersigned by the cashier in order to bind the banks were held by the Supreme Court of that state not to apply to such dealings and transactions as are usually and necessarily performed by the

ment of overdrafts by a cashier being a violation of his duty, see Bank *v.* Calder, 3 Strob. (S. C.) 403.

[1] McDermott *v.* Bank, 100 Pa. St. 287.

[2] Manufacturers' Bank *v.* Scofield, 39 Vt. 590.

[3] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326.

[4] Creswell *v.* Lanahan, 101 U. S. 347. What is necessary to show a cashier's authority to borrow money for the bank. Ringling *v.* Kohn, (1878) 6 Mo. App. 333; Donnell *v.* Lewis Co. Savings Bank, (1883) 80 Mo. 165.

[5] National Bank of Xenia *v.* Stewart, 114 U. S. 224.

[6] Dorsey *v.* Abrams, 85 Pa. St. 299.

[7] Crain *v.* National Bank, 114 Ill. 516.

[8] City Bank of New Haven *v.* Perkins, (1859) 4 Bosw. 420.

cashier of a bank, such, for instance, as the drawing or indorsing by a cashier in connection with bills of exchange, checks and drafts.[1] A cashier may, *ex-officio*, indorse a note the property of the bank so as to authorize a demand and notice to the indorser.[2] In the course of his ordinary duties, the cashier of a bank, *virtute officii*, may transfer the paper securities of the bank in payment of the debts of the bank. The inducement for such indorsement of the papers need not appear; in the absence of proof to the contrary the presumption would be in favor of the propriety of the transfer. But such an inference would not be conclusive. A party interested would be authorized to controvert the fairness of the transfer by showing that it was not made in the regular course of business, but in prejudice of the rights and interests of the bank, and thus defeat the transfer.[3] The exercise by the cashier of a bank of his power to pledge the negotiable securities belonging to the bank is *prima facie* evidence that he had the power.[4] Without authority from his bank, evidenced by a resolution of the board of directors, usage in like cases, or in some other way, a cashier cannot transfer non-negotiable paper.[5] But he has authority growing out of his peculiar relation to the bank and his duties resulting therefrom to transfer negotiable paper belonging to the bank for a legitimate purpose.[6] A cashier can invest no clerk of the bank with any more of his power than is necessary to enable the clerk to carry on the usual and ordinary business of the bank. A clerk acting as cashier in the absence of that officer has no authority, unless conferred upon him by the directors, to transfer notes or

[1] Merchants' Bank *v.* Central Bank, 1 Ga. 418; Cary, Assignee, *v.* McDougald, 7 Ga. 84.

[2] Hartford Bank *v.* Barry, (1821) 17 Mass. 94; Folger *v.* Chase, (1836) 18 Pick. (Mass.) 63.

[3] Everett *v.* United States, 6 Port. (Ala.) 166. As to the power of a cashier of a bank to transfer its notes and assets in payment of the bank's indebtedness, see Kimball *v.* Cleveland, 4 Mich. 606; Peninsular Bank *v.* Hanmer, 14 Mich. 208. Whether the power to apply the assets in this way includes the power to guarantee their collection or invalidity was questioned in the last case. As to the powers of a cashier in discharging and transferring securities, etc., of the bank, see State *v.* Commercial Bank of Manchester, 6 Smedes & Marsh. (Miss.) 218; Harper *v.* Calhoun, 7 How. (Miss.) 203; Crocket *v.* Young, 1 Smedes & Marsh. (Miss.) 241.

[4] Mercantile Bank *v.* McCarthy, (1879) 7 Mo. App. 318; Bank of State *v.* Wheeler, 21 Ind. 90.

[5] Barrick *v.* Austin, (1855) 21 Barb. 241.

[6] Bank of New York *v.* Bank of Ohio, (1864) 29 N. Y. 619.

securities of the bank.[1] A clerk thus temporarily acting for the cashier may transmit notes owned by the bank or held for collection to the bank's agents for that purpose, and to vest in the collecting agents such title as is necessary and proper to accomplish that object. But he has no power to transfer any other or higher title thereto, and the agents of the bank will not, as against the bank, acquire any lien on the notes for any balance due from the bank.[2] As its executive officer, a cashier of a bank has authority to take such measures for the security and eventual collection of a debt of the bank as he deems proper, and to act in reference to the collection or compromise of the debt according to the general usage, practice and course of business.[3] A cashier of a bank has power, *prima facie*, to indorse for collection notes discounted and notes deposited with the bank to be collected or deposited as collateral security.[4] But he cannot indorse, without special authority, a note made payable to a bank and discounted by another person.[5] A cashier may bind a bank for costs incurred in the collection of a note which he has indorsed for collection.[6] That it was the usage of a bank, or that the bank, through its directors, had adopted his act, if proven, would be a sufficient authority for the satisfaction of judgments in favor of the bank by its cashier, although he may have no authority under seal or in writing to satisfy such judgments.[7] A cashier has no power to accept bills of exchange on behalf of the bank for the accommodation merely of the drawers.[8] A bank will be bound by the official signature of its cashier to a negotiable note.[9] A bank may be held liable for a loan obtained on its account for which the personal note of its cashier may be given on a count for money had and received.[10] Unless the power to accept has been conferred upon him by the corporation, a bank will not be bound

[1] Potter *v.* Merchants' Bank, (1864) 28 N. Y. 641.

[2] Ibid.

[3] Bridenbecker *v.* Lowell, (1860) 32 Barb. 9.

[4] Elliot *v.* Abbot, 12 N. H. 549; Corser *v.* Paul, 41 N. H. 24, 26.

[5] Cross *v.* Rowe, 22 N. H. 77.

[6] Eastman *v.* Coos Bank, 1 N. H. 23, 25. As to the power of a cashier of a bank to collect a note due it and to adopt such measures as may be necessary to that end, see Young *v.* Hudson, (1889) 99 Mo. 102.

[7] Bancroft *v.* Wilmington Conf. Academy, 5 Houst. (Del.) 577.

[8] Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

[9] Rockwell *v.* Elkhorn Bank, 13 Wis. 653; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

[10] Chemical Nat. Bank of Chicago *v.* City Bank of Portage, (Ill. 1895) 40 N. E. Rep. 328.

by its cashier's acceptance of a bill of exchange in his official capacity.[1] A cashier of a bank has no power to transfer judgments in favor of the bank, or to dispose of its property.[2] Neither has he power to discount a note; but if he discount a note his act will be valid, if afterwards ratified by the bank.[3] By his general power to certify checks, a cashier of a bank is not authorized to certify a post-dated check.[4] The general powers of its cashier do not include authority to bind a bank to indemnify an officer for levying on property.[5] There is no implied power in a cashier of a bank to pledge its assets for payment of an antecedent debt.[6] A cashier of a bank as such has no power to accept a note signed by two parties only, in payment and discharge of a note upon which another party was also bound with the two, so as to release the third party from his indebtedness to the bank.[7] Neither can he, *virtute officii*, release a surety upon a note, even though the bank holds other security to which it might resort, nor make collateral contracts or agreements of any kind.[8] It is not within the ordinary scope of the duties of a cashier of a bank to discharge a surety on a debt due the bank.[9] A cashier of a bank cannot, by reason of the general authority he may have to certify checks, certify his own checks or issue certificates of deposit to himself.[10] It would be beyond the scope and power of the cashier of a private bank (himself a partner) to enter credits upon the bank book of a depositor without any check, bill or note being presented for discount. Should he enter the credits on the books of the bank and the depositor be permitted to draw the money, the bank would be estopped from setting up the want of authority in the cashier; but it would be otherwise as to credits not entered on the books of the bank, though duly entered on the

[1] Pendleton *v.* Bank of Kentucky, (1824) 1 Mon. (Ky.) 179.

[2] Holt *v.* Bacon, 3 Cushman, (Miss.) 567.

[3] Planters' Bank *v.* Sharpe, 4 Smedes & Marsh. (Miss.) 75.

[4] Clarke National Bank *v.* Bank of Albion, (1868) 52 Barb. 592.

[5] Watson *v.* Bennett, (1851) 12 Barb. 196.

[6] State of Tennessee *v.* Davis, (Sup. Ct. N. Y. Spl. Term, 1874) 50 How. Pr. 447.

[7] Ecker *v.* First National Bank of New Windsor, (1882) 59 Md. 291, 303.

[8] Ibid.

[9] Daviess Co. Savings Association *v.* Sailor, (1876) 63 Mo. 24. That a cashier has no power to discharge a surety on bank paper, see Cocheco National Bank *v.* Haskell, 51 N. H. 116. Release of surety by cashier. Merchants' Bank *v.* Rudolf, 5 Neb. 540.

[10] Lee *v.* Smith, (1884) 84 Mo. 304.

depositor's pass book.[1] The cashier of a national bank which holds the paper of a firm of which he was a member, it has been held, could not waive liability on an accommodation note procured by him to be substituted for the indebtedness of his firm.[2] A cashier of a bank cannot bind it as an accommodation indorser on his individual note.[3] Neither can he bind the bank by assurances that would release parties from their liability on a note held by the bank.[4] The act of an assistant cashier of a bank, prohibited by the bank to certify checks, in accepting a post-dated check without any usage to justify it, would be void, even as toward a *bona fide* holder.[5] A director in a savings institution of West Virginia, by collusion with other directors and the co-operation of the cashier, when he knew the institution was insolvent, withdrew a deposit of a large sum of money which he had had for some length of time in the institution at interest. The money was not paid to the whole amount, but the cashier paid him in bills and notes which had been discounted by the bank and belonged to it. The bank having made an assignment to one for the benefit of its creditors, he brought his action against the director to recover the amount which he had received on the ground of the fraud and other wrongdoing by which it was accomplished. The Court of Appeals of West Virginia held that this assignee or trustee was entitled to recover in proper action the amount of deposits which this director had withdrawn under the circumstances disclosed in the case.[6] In an action by a Nebraska

[1] Williams *v.* Dorrier, 135 Pa. St. 445.

[2] Allen *v.* Bank, 127 Pa. St. 51.

[3] West St. Louis Savings Bank *v.* Shawnee County Bank, 95 U. S. 557.

[4] Bank of Metropolis *v.* Jones, 8 Pet. 12.

[5] Pope *v.* Bank of Albion, (1874) 57 N. Y. 126.

[6] Lamb *v.* Cecil, (1884) 25 W. Va. 288. It was necessary in determining this question for the court to discuss the question of the power and authority of a cashier to dispose of the discounted bills and notes, the property of the bank. Upon that question it was said by JOHNSON, President, speaking for the court: "It is not pretended that he had any such authority from the board of directors. The whole record is against any such presumption as this. Did he then, *virtute officii*, have the right to dispose of the discounted bills and notes of the bank? There is nothing in the charter of the institution conferring that right upon him. The management is there conferred upon a board of directors. The Court of Appeals of New York, in Hoyt *v.* Thompson, 1 Seld. 320, held that where the management of the affairs of a corporation is intrusted by its charter to a board of directors, the president and cashier, unless specially authorized by the charter, have no power to assign the choses in action of

bank upon a note the maker, as a defense, claimed payment of the balance due on the note, in that he had sold to the bank through its cashier certain shares of stock in an insurance company, the cashier promising at the time that he would credit them on the note when it should be returned from another city, where it then was. The Supreme Court of Nebraska held that the cashier, by virtue of his office, had not the power to accept the stock of the insurance company in payment of the debt due the bank, but that power, if it existed, was lodged in the directory, and, as it had not expressly authorized the cashier thereto, he exceeded his power in agreeing to accept, on behalf of his principal, the insurance company stock in payment of the debt due the bank, and that the bank was not bound thereby.[1]

the corporation to its creditors as security for the payment of a precedent debt of the corporation without authority from the board of directors. An assignment so made is not merely voidable, but is absolutely void. RUGGLES, Ch. J., in delivering the opinion of the court, said: But the power and duties of the president and cashier are not prescribed by the charter; no power is conferred upon them to mortgage, assign or dispose of the property of the corporation. This is a part of the management of the business of the company which is confined expressly to the directors, but not to the president and cashier. In no case has it been held that these officers are authorized to do an act like that in question without the assent and authority of the directors. To the same effect is Spear *v.* Ladd, 11 Mass. 94, and Bank *v.* Pepoon, 11 Mass. 288. Indeed, in the first of these cases it was gravely considered whether the board of directors could confer such powers on the president and cashier; and, in the second, whether they could confer it on any attorney. In the last-named case, PARKER, Ch. J. (p. 292), said: 'This power puts the whole property of the bank under the control of the directors, and without doubt the power may be abused. But the stockholders should provide against this evil in the choice of directors. Having this power, there is no reason why it should not be exercised by one of the body with the consent of the rest, expressed by their vote. We are satisfied, therefore, that the directors might by their vote or power of attorney authorize the president or any other officer of the bank to assign over the promissory notes payable to the company.' In Fleckner *v.* U. S. Bank, 8 Wheat. 338, it was held that the authority of the cashier to assign a note of the bank need not be under the corporate seal, but that a resolution passed by the directors was sufficient authority for the cashier. I can find no authority which holds that the cashier, without authority from the directors, can dispose of the discounted bills and notes of the bank. It would be a dangerous power, indeed, to repose in an officer of the bank. It would put a large part of the property of the bank under the absolute control of the cashier or other officer exercising such power; and he might, for his own use, dispose of such property and pass good title thereto."

[1] Bank of Commerce *v.* Hart, (1893) 37 Neb. 197. RYAN, C., speaking for the court, as leading to and supporting

§ 308. Cashier's liability for his acts.— A cashier applying to his use securities of a bank will be liable on his bond for the full amount.[1] And a misapplication by such officer of funds delivered to him out of business hours and remote from the banking house, will be a violation of the condition of his official

their conclusion, made reference to leading authorities, as follows: "In Sandy River Bank *v.* Merchants & Mechanics' Bank, 1 Biss. 146, the facts were: The cashier of the Mechanics' Bank settled an account of twenty-two thousand dollars with the cashier of the Sandy River Bank, by paying ten thousand dollars cash and giving twelve thousand dollars private paper, which the cashier of the Sandy River Bank accepted in payment, and gave a receipt in full. The Sandy River Bank brought its action against the Merchants and Mechanics' Bank on the account. The latter pleaded payment by the contract with the cashier. The question in the case was whether the cashier had authority to receive in payment anything but money. In the course of the opinion delivered, the judge said: 'A cashier of a bank is ordinarily the executive of the bank. He is the agent through whom third persons transact their business with the bank. The bank generally holds him out to the world as having authority to act according to the general usage, practice and course of business, and all acts done by him within the scope of such usages, practice and course of business, bind the bank as to third persons who transact business with him on the faith of his official character; and perhaps it may be presumed without proof, and merely from his office, that he is authorized to receipt and discharge debts, and deliver up securities on payment or discharge of the debt for which they are held. * * * But still this authority is a *limited authority*, and when a party claims a discharge from a debt due the bank, not by payment, but by giving other or different notes, bills or securities, which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof. As a general rule, a jury have not a right to infer that the cashier of a bank, as such, has the authority to compromise and discharge debts without payment or by taking other securities, but the authority from the bank must be shown expressly or by necessary implication, or it must * * * be established by the particular usage or practice or mode of doing business of the bank, or it must be ratified or acquiesced in by the bank in order to be binding.' In United States *v.* City Bank of Columbus, 21 How. 356, the facts were: The cashier of the Columbus Bank gave to one of its directors, Miner, a letter to the secretary of the treasury of the United States, to the effect that Miner had authority to contract in behalf of the bank for the transfer of money for the government. Relying upon this letter, the secretary of the treasury made a contract with Miner for him to transfer one hundred thousand dollars of the government's money from New York to New Orleans. Miner received the money, but never delivered it. The United States brought suit against the Columbus bank to recover the money. The Supreme Court of the United States decided that the action could not be successfully maintained, as the cashier

[1] Pendleton *v.* Bank of Kentucky, (1824) 1 Mon. 179.

bond.[1] A cashier of a banking corporation, having authority to loan the money of the bank, with or without security, has been held in California liable for losses arising from loans without security not entered in the books of the bank nor reported to the board of

of the Columbus bank had no authority to make such a contract, and there was no proof that the board of directors had authorized it. In the course of the opinion Justice SWAYNE said: 'The court defines the cashier of a bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. * * * The term 'ordinary business,' with direct reference to the duties of cashiers of banks, occurs frequently in * * * reports of the decisions of our state courts, and in no one of these has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary.' The court then addressed itself to the case at bar, and said: The power of this bank to purchase stock in an insurance company, if it exists at all, is an extraordinary power and one not confided to the cashier, but belonging to the directory. In The Bank of Healdsburg *v.* Bailhache, 65 Cal. 329, it is said that the power to make a settlement of defalcation to a bank, and accept a deed of real estate in satisfaction and release, is the function of the board of directors and not of any individual director or officer. It has also been decided that, in the absence of special authority, the cashier of a bank could not release the surety from a note owned by the bank. Merchants' Bank *v.* Rudolf, 5 Neb. 527; Cocheco National Bank *v.* Haskell, 51 N. H. 116. That in the absence of special authority or established usage the cashier has no power to compromise claims due his bank. Chemical National Bank *v.* Kohner, 8 Daly, 530. That he had no authority to bind his bank by issuing a certificate of deposit to himself. Lee *v.* Smith, 84 Mo. 304. Nor bind the bank by an official indorsement of his own note. West St. Louis Savings Bank *v.* Shawnee County Bank, 95 U. S. 557. The cashier of the [plaintiff bank], then, as the executive officer of the bank, was clothed with authority to collect all debts due the bank, but this means collections in money. If a cashier may discharge the debts due his bank by exchanging the evidences of them for stocks of an insurance company or a gas company, then he can, under the name and charter of the bank, conduct an entirely different business, and use the funds of his stockholders for a purpose for which they were never subscribed, and in violation of the law of the bank's creation. The purposes for which [this bank] was organized, as expressed in its articles of incorporation, were to receive deposits of money and pay the same out on proper vouchers; to loan money on personal security; to issue

[1] Ibid.

trustees, but treated in his reports to the board as cash on hand.[1] The obligors upon a bond of the cashier of a bank under a condition for him "safely and securely to keep all moneys deposited, and to refund and pay over the same when properly required," will not be held liable for money violently robbed from him while in the discharge of his duty.[2] A bond of a cashier of a bank framed to cover past as well as future delinquencies will be invalid against a surety, if his name was procured at the desire of the directors where they have knowledge that past defalcations exist of which the surety may be ignorant and withhold the knowledge from him when they have a suitable opportunity to communicate it.[3] A cashier of a bank employed to sell certain shares of its stock at a fixed price, but before he had completed the sale, the bank was enjoined and proved insolvent, has been held not to be responsible for the supposed value of the stock, no negligence on his part in forwarding the sale being shown.[4] Where a bank brings an action against its cashier for a wrongful appropriation of moneys, it would be no defense that at the time of the appropriation he was the owner of four-fifths of the stock of the bank and had since that time sold all of his stock to other parties who were now the officers and managing authority of the bank.[5] The condition of

drafts or letters of credit; to buy and sell securities of every kind, and do a general banking business. Had this charter expressly provided that the corporation might invest its funds in stocks of insurance companies and deal generally in stocks of other corporations, such a provision would have been contrary to the laws of the state and void. But there is no provision in the bank's charter which by any reasonable construction can be construed into an authority to purchase and hold the stocks of any other corporation. True, it says 'to purchase securities of every kind,' but certificates of stock are not securities within the meaning of this provision, nor such as the word imports in commercial or banking phraseology. 'Securities,' as here used, means notes, bills, evidences of debt, promises to pay money." As to the authority of a savings bank's treasurer, having power to collect its debts, under orders of the board of investment, to execute a power of sale under a mortgage to the bank, by conveying to a purchaser, see North Brookfield Sav. Bank *v.* Flanders, (Mass. 1894) 37 N. E. Rep. 307. See, also, Bank *v.* Keavy, 128 Mass. 298; Holden *v.* Upton, 134 Mass. 177, 179; Trustees of Smith Charities *v.* Connolly, 157 Mass. 272; s. c., 31 N. E. Rep. 1058.

[1] San Joaquin Valley Bank *v.* Bours, (1884), 65 Cal. 247.

[2] Bank of Huntsville *v.* Hill, 1 Stew. (Ala.) 201.

[3] Franklin Bank *v.* Cooper, 36 Me. 179; Franklin Bank *v.* Stevens, 39 Me. 532; Franklin Bank *v.* Cooper, 39 Me. 542.

[4] Washburn *v.* Blake, 47 Me. 316.

[5] First National Bank *v.* Drake, (1883) 29 Kans. 311.

the bond of the cashier of a state bank as required by the statute of Indiana is that he "will honestly and faithfully discharge [his] duties as such [officer] * * * during [his] continuance in office." This was an action against the cashier of a bank and his sureties upon his official bond, and his acts complained of were that he converted different amounts of the large sums of money coming into his hands to his own use, as alleged in one paragraph of the complaint. In another it was alleged that pursuant to the by-laws of the bank it had organized an "exchange committee, composed of its president, cashier and a designated director; that the by-laws further provided that the cashier should not make loans in excess of five hundred dollars without the approval of such committee or one member besides himself." It was further alleged that as cashier that officer, in violation of his trust and the said by-laws, loaned and otherwise disposed of large sums of money belonging to the bank, which were wholly lost. Various other breaches of the bond were charged in allowing overdrafts of customers, making loans in violation of his trust and the rules and regulations of the bank; also, that by a conspiracy with two others, large sums of money were withdrawn from the vaults and invested in "options" and "bucket-shop deals" so-called; with further allegations of the entire loss of such moneys and the concealment on his part of these transactions from the other officers of the bank. The sureties, in their answer, admitted these allegations, but alleged that, in violation of its duty and the requirement of the by-laws in force when the bond sued on was executed, the bank failed to organize an "exchange committee," and because of such failure the duties of the cashier were delayed, and, as the result, the various breaches of duty and losses complained of ensued, and hence they were not liable. Berkshire, J., for the Supreme Court, in the opinion, said of this answer: "The basal rock upon which these paragraphs of the answer rest is the allegation that there was no exchange committee organized, as required by the by-laws;" and afterwards: "But the answers themselves disclose the existence of the 'exchange committee' provided for in the by-laws. They show that this committee was to be composed of the cashier, president and a designated director. The committee was composed of three members; the by-laws named two of them, or a majority; the failure to name a director for that committee did not deprive the committee of its powers;

the two had power to act. Besides, the by-laws provided that the cashier was at liberty to take any legitimate action in disposing of the funds of the bank with the approval of its president; hence, the approval of the chief officer would have been the cashier's justification as to any such transaction. But if it were conceded that the bank had entirely failed to provide for an 'exchange committee,' and in the absence of such committee that the cashier had exclusive and complete authority to transact any and all of the business of the bank, this would not relieve his sureties from liability because of his fraudulent conduct in connection with [co-conspirators], whereby large sums of money belonging to the bank were invested in illegitimate transactions. Under no circumstances was the cashier authorized to dispose of the funds of the bank for such purposes. With or without the approval of an 'exchange committee,' such as provided for, this was a clear violation of duty and rendered his sureties liable." The court further held that an agreement by the board of directors, after the execution of the cashier's bond, enlarging his duties, and increasing his salary, but not changing the character of his duties, or his relation to the bank as cashier, was no defense to this action against the sureties for the cashier's violation of duty.[1]

§ 309. Knowledge of its cashier not imputable to bank — illustration.— In an action by the makers of a note against a bank cashier to have the note surrendered for cancellation, it being alleged that there was fraud or misrepresentation on the part of one who was not only cashier of the bank which had discounted the note for the corporation, and also secretary and treasurer of this outside corporation, concerning which the representations alleged to be fraudulent were made, it was attempted to charge the bank with his knowledge. The Supreme Court of Missouri, in affirming the dismissal of this bill, stated "that," as shown by the evidence, "in the negotiation for the sale and further delivery of the stock [the cashier of the bank] represented, and only represented, the company; that the plaintiff relied wholly upon him, as the secretary and treasurer of the company, for the delivery of the stock for which he had contracted. To that transaction the bank was an entire stranger, and in it its cashier neither represented, nor undertook to represent, the

[1] Wallace v. Exchange Bank of Spencer, (1890) 126 Ind. 265.

bank."[1] Notice to a cashier that stock pledged to a bank was trust stock has been held to be notice to the bank of that fact.[2] It has been held in Vermont that notice to the attorney of a bank or to the cashier, while acting in the matter of attaching land for the benefit of the bank, of an equitable right in a third person — as, by a defective deed or record — was notice to the bank.[3]

§ 310. Rules as to ratification of a cashier's act by the bank.—In a case before the Supreme Court of Iowa it appeared

[1] Benton *v.* German-American National Bank, (Mo. 1894) 26 S. W. Rep. 975; citing 1 Mor. Priv. Corp. § 540c; Bank *v.* Loyhed, 28 Minn. 396; s. c., 10 N. W. Rep. 421; DeKay *v.* Water Co., 38 N. J. Eq. 158; Wilson *v.* Bank, (Pa.) 7 Atl. Rep. 145. See, also, Bank *v.* Christopher, 40 N. J. L. 435; Inerarity *v.* Bank, 139 Mass. 332; s. c., 1 N. E. Rep. 282; Barnes *v.* Gas Light Co., 27 N. J. Eq. 33; Bank *v.* Neass, 5 Den. 329; In re European Bank, 5 Ch. App. 358; Bank *v.* Savery, 82 N. Y. 291; Fisher *v.* Murdock, 13 Hun, 485; Oates *v.* National Bank, 100 U. S. 239, 245; Louisiana State Bank *v.* Senecal, 13 La. 527; Branch Bank at Huntsville *v.* Steele, 10 Ala. 915. The Missouri court said: "Whatever may have been his knowledge of the condition of the company's stock account, or of its affairs generally, that knowledge cannot be imputed to the bank when, subsequently, he came to procure for that company a discount of paper acquired in his negotiations for the company which he represented. It seems to be well-settled law in this state that knowledge which comes to an officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation. State Savings Assn. *v.* Nixon-Jones Printing Co., 25 Mo. App. 643; Bank *v.* Schaumburg, 38 Mo. 228; Manhattan Brass Co. *v.* Webster Glass & Queensware Co., 37 Mo. App. 145; Hyde *v.* Larkin, 35 Mo. App. 366; Johnston *v.* Shortridge, 93 Mo. 227; s. c., 6 S. W. Rep. 64; Bank *v.* Lovitt, 114 Mo. 519; s. c., 21 S. W. Rep. 825. In this last case, which is quite analagous to the case in hand, we held that: 'An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such transaction his interest is adverse to the bank, and he represents himself and not the bank. The law is well-settled that where an officer of a corporation is dealing with it in his individual interest the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction.' A corollary of the foregoing proposition is that if a person is an officer of two corporations, and these corporations enter into dealings with each other, the knowledge of the common officer cannot be attributed to either corporation in a transaction in which he did not represent it."

[2] Duncan *v.* Jaudon, 15 Wall. 165.

[3] Vermont Mining Co. *v.* Windham County Bank, 44 Vt. 489. As to the effect upon the teller of the bank of knowledge of a cashier that a note acquired by the bank was fraudulently negotiated, see Fall River Union Bank *v.* Sturtevant, (1853) 12 Cush. (Mass.) 374. As to the declarations of officers not admissible against a bank to prove facts, see Pemigewassett Bank *v.* Rogers, 18 N. H. 255, 261; Grafton Bank *v.* Woodward, 5 N. H. 301, 308.

that certain shares of stock in an investment company were sold by the president of the company, in payment for which the cashier gave him credit on the books of the bank for the agreed price of the stock. The shares were then placed in an envelope marked and figured as an item in the cash account for a sum in excess of the agreed price. The cashier afterwards abstracted from the envelope the amount in excess of the agreed price and appropriated it to his own use. Upon this fact being afterwards ascertained on an examination of the bank's affairs, an action was brought by the bank against the cashier to recover this amount. His defense was that it was his private transaction. The main question presented to the Supreme Court was as to a ratification by the bank of the acts of the cashier by which he claimed that the transaction was his and not that of the bank, so that the profits would belong to him. The Supreme Court approved the following instructions by the trial judge upon this point: "In regard to this transaction the defendant claims that he purchased said stock as an individual and not as cashier, for himself and not for the bank, for eleven thousand dollars; that he borrowed the money of the plaintiff bank to pay therefor, and that thereafter he sold said stock to plaintiff for fourteen thousand three hundred and fifty dollars; and, further, that March 31, 1891, [after he had ceased to be cashier] a final settlement between the plaintiff and defendant was had, and that the facts in regard to said transaction were fully made known to plaintiff, and that, with full knowledge of all said facts, plaintiff ratified and approved the same, and that thereby plaintiff is estopped from claiming thereupon. The jury are instructed that if they find that at said time, or at any time subsequent to the transaction, the plaintiff, with full knowledge in regard to all the facts in relation thereto, acquiesced in and adopted and ratified said transaction, then they are estopped from now recovering thereon, and in this issue you should find for the defendant. And, further, you are instructed that as soon as the facts were known to plaintiff's directors, if they were ever known, it was their duty to either adopt the transaction or repudiate it; and, if they elect to repudiate it, they should repudiate it altogether. They cannot repudiate it in part and adopt it in part. But, as to all acts prohibited by law, no affirmative act of repudiation is necessary. The law presumes that they are repudiated, and will not presume or infer an affirm-

ance. Such acts, to estop plaintiff from recovery thereon, must be expressly ratified, and with full knowledge of all the facts in relation thereto; and the burden of proof is upon the party who relies upon a ratification of such unauthorized and unlawful act to prove that the principal, having such knowledge, acquiesced in and adopted and ratified such acts of its servants and agents."[1] The Supreme Court of Iowa also in this case approved the refusal of the trial judge to allow the defendant to show a custom of the officers of the bank whereby the defendant, its cashier, had been permitted, from time to time since the organization of the bank, to make loans to himself, giving his notes or other securities as he thought proper.[2]

[1] Iowa State Sav. Bank *v.* Black, (Iowa, 1894) 59 N. W. Rep. 283. It was said by the court: "Appellant complains of the instruction in that 'the term 'expressly ratified' calls for a higher degree of action and a more definite specific performance than the law requires.' A purpose of the instruction was to inform the jury as to plaintiff's rights and duties in matters where the acts of the defendant were prohibited by law, and that as to such matters the law will presume that they were not acquiesced in or approved until expressly ratified. The phrase is not to be understood as requiring a ratification in terms, for there is no evidence of such a ratification. As a matter of fact, the bank did not in terms ratify defendant's act, and hence the jury must have understood that the instruction meant that the intent to approve the acts must have been plain or clear. With that view the instruction is not erroneous. It is said that it is error to say of such acts that the law 'presumes that they are repudiated, and will not presume or infer an affirmance.' It is certain in such a case that the presumptions of the law are against ratification. The law will not presume that one person ratifies the unlawful acts of another. The instruction means no more than that, in the absence of proof of an intent to ratify the acts of defendant, the presumptions of the law are against it. The law does not require one man to affirmatively repudiate the unlawful acts of another or presume his approval or affirmance of them."

[2] Iowa State Sav. Bank *v.* Black, (Iowa, 1894) 59 N. W. Rep. 283. The court said: "The object of the testimony was to prove that the officers of the bank allowed defendant to make illegal loans to himself and thus estop the bank from showing that the loan, now claimed by them, was not legal. The court, speaking of the defendant, said to the jury: 'He had no right or authority as such cashier to loan himself as an individual or to use in any manner for himself the funds of the bank, and all such acts are wholly unauthorized and contrary to law.' The instruction is but expressive of the statute law of the state regulating state banks, and the policy of the law is public. It cannot by any custom of the officers of the bank be disregarded with impunity. The security of the bank against such practices is, in a very important sense, the security of the public in dealing with the bank. A design of the law was to

§ 311. Act of cashier binding upon the bank — illustration.— The cashier of a national bank had a note executed by a certain party payable to his bank discounted by another bank, upon the usual indorsement of his bank by him as cashier. Just before this note was falling due, the same party executed a note for a larger sum payable to the cashier individually. This note he indorsed individually and then placed the indorsement of his bank by him as cashier in the usual manner. He then presented before the other note was due this second note for discount to the same bank. They discounted it and upon his request applied a part of the proceeds of the discount to the payment of the other note and gave the bank's check to them for the balance, The bank discounting this note brought its action in a Minnesota court against the receiver of the bank represented by this cashier, such bank having become insolvent, to have the sum due on the note adjudged a legal claim upon the assets of the bank in his hands. Among the findings of the court below was one that "the plaintiff [meaning its officers] in good faith believed that [the negotiator with it in the transactions] was acting as cashier of said bank in said transaction, and had no evidence to the contrary, and no reason to believe anything to the contrary, except what appeared by said proceedings and said notes hereinbefore specified; that said plaintiff gave credit to said [insolvent] bank, and to said [negotiator] in all of said transactions." Also this finding: "Both of said notes were made by said [maker] and by her delivered to said [negotiator] for his individual use and accommodation; but plaintiff had no notice or knowledge thereof, except as shown by the notes themselves, until after it had discounted them." There was an insistment, on behalf of the receiver, that the plaintiff's cashier, who discounted the note in suit, was not justified upon these facts in supposing that the negotiator was acting officially, as cashier of the insolvent bank, in procuring the money on the note; and that his statements or conduct in the transaction were immaterial, in view of the fact that the note showed on its face that it appeared to be his individual note, and he had no authority in fact to make an accommodation indorsement thereon in behalf of the bank. The Supreme

prevent such loans being in any way made and to permit the proposed showing by defendant as an estoppel would defeat a principle, if not the entire purpose, of the law."

Court held that in view of the fact that this negotiator was the acting cashier of the insolvent bank, entitled to make indorsements in this form of paper belonging to the bank, and presented himself in that capacity in this instance, the paper itself bore no marks of suspicion sufficient to affect the title of the bank as a purchaser in good faith, which, upon the facts, would otherwise be presumed.[1]

§ 312. Promise by cashier to pay draft of a customer to be drawn at a future day — not binding on the bank.— A national bank is empowered by United States Revised Statutes (§ 5136) "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental

[1] Merchants' National Bank of St. Paul *v.* McNeir, (1892) 51 Minn. 123. The court said: "[The negotiator] assumed to be acting in his official capacity, and appeared to be engaged in the business of his bank. He proposed to take up the note which he had before rightfully negotiated in behalf of the bank as cashier, and to substitute another executed by the same party. And the cashier of the plaintiff bank, as the court finds, in good faith, believed that [he] was acting officially for [his] bank, and the evidence sustains this finding. If the new note had been of the same amount as the old one taken up, the fact that it ran to [the negotiator] would hardly be claimed to be sufficient to excite suspicion. And so, if the note had been subsequently negotiated by plaintiff, and had passed in the regular course of business into the hands of a remote indorsee, it would hardly be claimed that such indorsee was not a *bona fide* purchaser, either on the ground of notice from the note itself, or that he was bound to have instituted a preliminary inquiry as to the authority of [the negotiator] to make the second indorsement as cashier. The fact that [he] appeared to be the first indorser, and the bank the second indorser, was not, of itself, a circumstance so extraordinary or suspicious as to make the case one of gross negligence on the part of the plaintiff, and subject it to the imputation of bad faith in receiving the paper. Nor, in the face of the finding of good faith of the officers of the plaintiff in the transaction, did the circumstance that the surplus, over the amount due upon the old note, was paid directly to [the negotiator] either in currency or by check running to him, amount to notice of [his] intended fraud upon his bank, or make the plaintiff a purchaser *mala fide* of the note. It is not sufficient, under the rule applied to the transfer of negotiable paper, under the law merchant, that there be circumstances of suspicion such as would put a careful purchaser upon inquiry. The circumstances must be so pointed and direct as to amount to evidence of *mala fides*, in the absence of inquiry, or such as to be *prima facie* inconsistent with any other view than that there is something wrong in the title, and thus amount to constructive notice. 1 Dan. Neg. Inst. (4th ed.) § 796; 2 Rand. Com. Paper, §§ 998, 1001; Tied. Com. Paper, § 289; Freeman's Nat. Bank *v.* Savery, 127 Mass. 78, 79."

powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, * * * and other evidences of debt, * * * by loaning money on personal security," etc. It was held in the United States Circuit Court for the southern district of California that under no provision of the statute above referred to did the cashier of a national bank have power to bind the bank to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expected to have a deposit from him sufficient to cover it, and that no action would lie against the bank for its refusal to pay such a draft.[1]

§ 313. Estoppel of a bank to deny the validity of an act of its cashier in drawing drafts on its correspondent, and fraudulently indorsing them.—In a very recent case before the New York Court of Appeals, which was an action by the receiver of an insolvent South Carolina bank to recover a deposit

[1] Flannagan *v.* California Nat. Bank, (1893) 56 Fed. Rep. 959. The court said: "In Bank *v.* Dunn, 6 Pet. 51, the court would not permit the president and cashier of the bank to bind it by their agreement with the indorser of a promissory note that he should not be liable on his indorsement. It is said it is not the duty of the cashier and president to make such contracts, nor have they power to bind the bank, except in the discharge of their ordinary duties." The court then referred to U. S. *v.* City Bank of Columbus, 21 How. 356, and afterwards said: In West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557, where it was attempted, but unsuccessfully, to bind a bank as an accommodation indorser on the individual note of its cashier, the court said: "Ordinarily the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the powers necessary for such an officer in the transaction of the legitimate business of banking. Thus he is generally understood to have authority to indorse the commercial paper of his bank, and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured *bona fide* rediscount of the paper of the bank, his acts will be binding because of his implied power to transact such business; but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carried notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss."

of that bank in a bank in the city of New York, it appeared that the latter had debited the former with certain checks which the cashier of the insolvent bank had drawn upon the New York bank, payable to certain customers of the bank of which he was the cashier, and then indorsed the names of these payees upon the checks, making them payable to the order of a New York firm of brokers, who collected the amount of these checks from the bank upon which they were drawn. The New York Court of Appeals in its opinion referred to the discussion of the trial judge of the question of what the act of the cashier of the bank amounted to in law, as follows: "In his judgment, the cashier's indorsement of the checks in the name of the payee, which he had written in the body of the check, was not, in a legal sense, forgery. He said that act did not defraud the persons whose names were used as payees, nor the bank in New York, nor his own bank, but that the fraud consisted in the unlawful drawing of the check for his own purposes, with the intent to convert his own bank's funds. Regarding the transaction in that light, and the indorsement as a part of one continuous act of preparing the check so that the New York bank should pay the funds drawn upon to the indorsees, he very properly reached the conclusion that, so far as the New York bank was concerned, the cashier's intent was the intent of his bank, and, hence, the payment of the checks was conclusive upon it." Then it is said of the review of the legal questions by the General Term, sustaining the judgment of the trial judge dismissing the complaint: "Upon the question of the effect upon the transaction of the use by [the cashier] of names, as payees, of persons who were the customers of the bank, it is said in the opinion that that fact did not prevent the application of the principle which would govern if fictitious names had been selected and used for payees. They held, in substance, that the bank, through its authorized officer, had put in circulation paper, with knowledge chargeable to it, that the names of the payees did not represent real persons, and with the intention to indorse thereon the names of the payees, who, for all intents and purposes, were fictitious payees, and whose names were adopted and resorted to as a device to avoid suspicion." The Court of Appeals approved these two judgments.[1] A

[1] Phillips *v.* Mercantile National Bank of the City of New York, (1894) 140 N. Y. 556, 559, 560, affirming 67 Hun, 378. The Court of Appeals in their

national bank of the city of New York was the correspondent of a country national bank. One who, during the time in which the transaction in controversy in this case took place, was cashier, and during the remainder of the time was president of the country bank, all the time practically managed the bank, and his codirectors and other officers had little or no oversight of

opinion distinguished Shipman *v.* Bank of the State of New York, 126 N. Y. 318, in these words: "There it had been found that the checks were signed by the firm, in the belief that the names of the payees represented real persons entitled to receive the amount of the checks, and with the intention that they should be delivered to real payees and should not go into circulation otherwise than through a delivery to and an indorsement by the payees named. [The] employment [of their clerk] did not comprehend the drawing or indorsement of checks or drafts, and in indorsing upon the checks the names of the payees he committed the crime of forgery, because he was without authority in that respect and did so with the intention to deceive his employers, the makers, and to put their checks in circulation for his account. That was a case wholly other than was made out here. It was stated in the Shipman case that the maker's intention is the controlling consideration, which determines the character of the paper, and that the statutory rule, which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though [this cashier] selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was in legal effect as though he had selected any names at random. The difference is that, by the methods resorted to, he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons [the bank whose cashier drew these checks] would have had no claim upon the defendant; how, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? As cashier, invested with the authority to draw checks upon the bank's accounts with its correspondents, instead of drawing them directly to the order of the parties, who he intended should get the moneys, he drew them to the order of persons who had no interest in them, and thereupon wrote their names under a direction to pay to the real parties, who were intended to be the recipients of the funds drawn upon. If the checks had been drawn directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law, and the only real parties were the firms in New York, to whom the cashier sent them in such form as that they could draw the moneys upon them. The fictitious-

its affairs. He was engaged in stock speculations on his own account in New York, and drew from time to time, for his own purposes, in favor of a firm in New York, his brokers, on the bank balance with the New York bank. His brokers from time to time returned to that bank sums to be credited to the country bank. The latter, being ruined by fraudulent operations of its officer before mentioned, who disappeared, became insolvent and was placed in the hands of a receiver. This receiver brought his action against the firm of New York brokers to recover the sums so paid to them by this officer of the country bank out of the balance to the credit of the bank with the New York bank. The brokers claimed the right to offset the return payments made by them to the New York bank. The trial court ruled that they were not entitled to do it, and no question in respect of them was submitted to the jury. For this error the United States Supreme Court reversed and remanded the case for a new trial, holding that, at the least, it was a question to go to the jury whether the officers of the bank, other than the dishonest official, in the exercise of reasonable and proper care, could have ascertained that

ness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose, to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers. It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature, but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cited from, is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them, made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity."

these moneys had been deposited to the account of the insolvent bank, and would or would not have accepted such deposits as the return of the moneys to the bank.[1] It appeared in a case that a bank clerk, the duty of whom it was to prepare exchange for the cashier's signature, so drew a draft for twenty-five dollars to his own order that the amount could be readily altered. After procuring the signature of the cashier to the draft by pretending that he wished to make a remittance of that amount, the clerk altered the draft so that it presented the appearance of a genuine draft for $2,500, indorsed it and had it discounted. It was sought in the action to hold the bank liable on this draft. The

[1] Kissam *v*, Anderson, (1892) 145 U. S. 435. Mr. Justice Brewer, speaking for the court, *arguendo*, said: "We think [the principle upon which the trial court acted, which was stated by counsel for plaintiff in his brief, as follows: 'It is settled by abundant authority that where one has taken the property of another damages are not mitigated by showing merely that the wrongdoer returned the property without the consent of the owner or applied it upon the owner's debts. It must appear still further that the owner consented to such action or that the proceeds were so applied under legal process without connivance of the wrongdoer, * * *'] does not control in this case. Defendants returned this money to the [country] bank. They deposited it with the [New York] bank, the correspondent of the [former], and the bank from which they received the money or the checks from the [former]. In fact, therefore, the money was placed where it was before it was taken — in the possession and under the control of the [country] bank. Not only that; the [New York] bank, in its due course of business, by monthly reports, informed the [country] bank that they had received this money, and held it subject to its order, and it was subsequently used by the [country] bank in drafts drawn by it in favor of other parties. If it be said that no officer of [this] bank knew of these deposits except [its cashier], the wrongdoer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is that the other officers and directors of [this] bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which [this] bank and not the defendants were responsible. [Defendants] had no supervision over its affairs, no knowledge as to how those affairs were managed. They were not called upon to go to [the place of its location] and hunt up the various officers and directors, and inform them, one by one, personally, that these moneys had been deposited to their credit in the [New York] bank. It was enough that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the [country] bank that it received and held those moneys. The learned circuit judge seemed to be of the opinion that, as they had assisted [this cashier] in withdrawing these funds from the bank, they could not escape responsibility, unless the sum total of his defalcation was reduced by their deposits to an amount less than that received from him. In his opinion overruling the motion for a new trial he thus ex-

United States Circuit Court of Appeals for the seventh circuit affirmed the judgment rendered in the Circuit Court in favor of the bank, holding that the forgery by the clerk, and not the negligence of the bank, being the proximate cause of the loss, the bank was not liable. Further, the bank was not liable on the ground that the forgery was committed by its confidential employee, because in this transaction he acted as a purchaser, and not as an employee, and the purchase of the draft being complete, he was the owner of it when the forgery was committed.[1]

§ 314. Teller and bookkeeper — their powers and duties. —There is no inherent, original power expressly conferred upon the teller of a bank, in the powers and duties usually conferred upon such officer and to be exercised by him, to enable him to certify that the checks of the depositors of the bank will be good when presented for payment at some future time; nor is such

pressed himself: 'Here all the money returned by [the wrongdoer] was insufficient to replace his defalcation by an amount much larger than the sum sought to be recovered of the defendants, and the bank had no knowledge that he had returned anything to replace what he had misapplied until he had again misappropriated it. It is not unjust or unreasonable to compel the defendants to restore such of the funds of the bank as they received when they are unable to prove that the bank was not directly or ultimately a loser in consequence of their acts. It may be that [the wrongdoer] would have misappropriated the money of the bank in other ways if they had refused to receive the checks, but certainly one temptation would not have been in his path if he had found that he could not use the paper of the bank for his speculations with the same facility as though it were his own money.' But surely they cannot be held for his subsequent wrongdoing. If they have returned a part of that they assisted him in wrongfully withdrawing, they are *pro tanto* relieved from responsibility, and are not to be chargeable with his after misconduct, in respect to which they had no part. It will not do to say that they put the money where he could check it out, and, therefore, are responsible for what he did with it. They deposited it to the credit of the [country] bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if [the wrongdoer], the cashier of the [country] bank, was the only officer authorized to draw on the [New York] bank, or charged with knowledge of the state of the account; but the president and teller had equal authority, and were equally chargeable with knowledge; in fact, it appears that these officers did draw drafts on the New York bank and thus diminished the total of deposits, and the other directors, also, were under some obligations to know the affairs of the bank; and it will not do to say that the bank can ignore the negligence of all its officers and profit by their omission of duty."

[1] Exchange Nat. Bank of Spokane *v.* Bank of Little Rock, (1893) 58 Fed. Rep. 140.

power incident to, or necessary to, the faithful discharge of any of his duties.[1] The court further held that a jury would not be warranted to infer such a power in a teller from evidence that the teller of the bank during all the time of his holding office whenever the convenience of the bank or of its customers required it, certified that checks were "good" which were drawn on the bank by its customers when funds to the amount of such checks were to the credit of the drawers, and his so doing was in some instances known to the bank and was not forbidden, or that it was the usage of the tellers of other banks to do the same; further, that the usage of issuing certificates of deposit by a teller of a bank was not evidence to prove a usage of certifying checks.[2] The teller of a bank in New York had general authority to certify checks, qualified by directions not to do so without funds, and to enter them in the books. He certified checks in violation of these instructions under a fraudulent arrangement with the drawer. The bank was held liable to a *bona fide* holder for value of the checks. The court further held that the delay of a year in presenting the checks for payment did not impair

[1] Mussey *v.* Prest., etc., Eagle Bank, (1845) 9 Met. (Mass.) 306. In the opinion the usual duties of such officer are thus stated: "The office of the teller is implied in the word used to designate it — to tell or count the moneys of the bank, which are received or paid out. The office is often divided into two branches, that of receiving teller and of paying teller, where the business of the bank is large and the duties cannot conveniently be united in one person. When united, the duty of the teller is to receive all moneys offered at the bank in payment of notes and bills previously discounted or lodged for collection as they severally fall due, and all moneys offered by customers of the bank to be deposited to their credit on account, whether arising from moneys brought by them to the bank, or the proceeds of discounts made for them; to pay the checks of depositors as the money is from time to time drawn out, or for notes discounted; and to redeem the bills of the bank with specie when the same is demanded. This is his official employment; and in the discharge of these duties he is regularly to account for the moneys he has received and paid out, not only to prevent mistakes, but to charge him when short or delinquent; and he is also made responsible for the payment of a check when the drawer has not a like amount to his credit unless he applies to the bookkeeper for information as to the state of the drawer's account; and then, if an overpayment is made through the mistake or fault of the bookkeeper, he and not the latter is responsible for the loss. And when checks on other banks are received in payment or on deposit (as is the usage among the banks of the city), it is made his duty to attend to their collection by a given hour of the day."

[2] Mussey *v.* Prest., etc., Eagle Bank, (1845) 9 Met. (Mass.) 306.

the holder's right.[1] A bank will be estopped by its teller, upon the presentation of a check bearing a forged certification, he being the officer whose certification it purports to be, pronouncing the certification genuine.[2] In a New York case it appeared that after the certification of a check it was raised and the name of the payee changed. The check was then tendered to the plaintiffs in this case, who sent it to the certifying bank during the busy part of the day, and its teller was asked if the check was good. Before this inquiry the drawer of the check had requested the bank to stop payment. The teller, however, responded affirmatively to the inquiry made as to the check being good. The Court of Appeals of New York held that the failure of the paying teller to call attention to the fact that the bank had been notified that the check had been lost in transit to the payee and that its payment had been stopped, which facts were entered upon the bank's register of certified bills, amounted to negligence which would authorize a recovery against the bank; further, that the fact that the teller did not know that the draft presented was the one the payment of which had been stopped, and his good faith in making the answer would not prevent a recovery.[3] Should the teller of a bank enter a check purporting to be drawn upon the bank in the bank book of a depositor as cash, and it should turn out that the check was forged, the bank would have to bear the loss.[4] Should the teller of a bank, after receiving, as cash, an invalid check upon another bank, consent to take it as his own and look to the drawer of the check for its payment, he cannot, afterward, without the consent of the bank authorities, return it to the bank.[5] A paying teller of a national bank has no power, without the sanction of its directory, to receive after banking hours a post-dated check and to agree, for the convenience of the holder of the check, that he will hold it until the day it is presentable and will then cause an account to be opened by the bank with the holder and the amount of the check placed to his credit so that it can be drawn against.[6] The functions of a note

[1] Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, (1855) 4 Duer, 219; affirmed in 16 N. Y. 125.

[2] Continental National Bank v. National Bank of the Commonwealth, (1872) 50 N. Y. 575.

[3] Clews v. Bank of New York, (1889) 114 N.Y. 70; s. c., 22 N.Y. St.Repr. 397.

[4] Levy v. Bank of the United States, 4 Dall. 234; s. c., 1 Binn. (Pa.) 27.

[5] Union Bank of Georgetown v. Mackall, 2 Cranch Cir. Ct. 695.

[6] Averell v. Second National Bank, (1890) 8 Mack. (D. C.) 246. As to a post-dated check the court said: "It should in due course of business be

teller of a bank do not extend to the erasure of the name of one of several makers of a note, simply upon his request.[1] A bank will not be bound by the statement of its teller that the indorsement upon a check is genuine.[2] It is a gross violation of duty for the officers of a bank to honor a check or draft beyond the drawer's deposits.[3] A bank will not be bound by an agreement of one of its officers to give notice to a surety in case of a default on the part of the makers of a note pledged as collateral, in the absence of proof that authority was conferred upon the officer to make it.[4] In paying a debt due to a bank in good faith upon demand of one whom he finds as one of its officers employed in its business behind its counter, without any knowledge that the officer's authority is so limited that he has no right to receive it, the bank will be bound by the payment.[5] The bookkeeper of a bank or his sureties will not be relieved from liability on his bond which provides that he would strictly account for all moneys belonging to the bank and apply its funds to their proper uses, by the consent of the cashier to the taking by the bookkeeper of money of the bank not due him and applying it to his own use.[6] If, in receiving as cash the check of an individual of good credit upon another bank, in which it afterwards appeared that he had no funds, the teller of a bank does only what is usual in the ordinary course of trade and business of banking and the usage of banks in like circumstances, his so taking it would not be a breach of the condition of his official bond to make good to the bank all damages it should sustain through his unfaithfulness or want of care.[7]

presented by the holder on the day of its date. It is payable only on that day or after. The duty of the banker is simply to pay his customers' checks over the counter when presented on or after their date. It is no part of his business to receive post-dated checks before they are payable and to engage to present them to himself, or, in other words, to consider them as presented to him for payment on the day when they are payable. Still less is it his business to engage in advance to pay checks which are post dated as before mentioned. If he should do so it would be at his own risk, for he could not refuse to pay other checks that might be presented in the meantime, although such payments would leave nothing to meet the post-dated checks."

[1] Marine Bank of Chicago v. Ferry's Admr., (1860) 40 Ill. 255.

[2] Walker v. St. Louis National Bank, (1878) 5 Mo. App. 214.

[3] Eichelberger v. Finley, 7 H. & J. (Md.) 381.

[4] New Hampshire Savings Bank v. Downing, 16 N. H. 187.

[5] East River National Bank v. Gove, (1874) 57 N. Y. 597.

[6] Chew v. Ellingwood, (1885) 86 Mo. 260.

[7] Union Bank of Georgetown v. Mackall, 2 Cranch Cir. Ct. 695.

CHAPTER XI.

DEPOSITS AND CHECKS.

§ 315. **General deposits.**— It is now perfectly well settled that the relation between banker and customer who pays money into the bank, or to whose credit money is received there on deposit, is the ordinary relation of debtor and creditor; and that when the bank receives the money as an ordinary deposit and gives credit to the depositor, the money becomes the funds of the bank and may be used by it as any other funds to which it may be entitled. It is accountable for the deposits that it may receive as debtor; and in respect to ordinary deposits, there is an implied agreement between the bank and the depositor that the checks of the latter will be honored to extent of the fund standing to his credit.[1] A deposit is general, unless made special by the depos-

[1] Hardy & Bros. *v.* Chesapeake Bank, (1879) 51 Md. 562, 585; Horwitz v. Ellinger, 31 Md. 492, 503; Foley *v.* Hill, 2 H. L. Cas. 28; Thompson *v.* Riggs, 5 Wall. 663; Bank of the Republic *v.* Millard, 10 Wall. 152, 155. As to the relation between general depositors and a bank, see Marine Bank *v.* Fulton Bank, 2 Wall. 252; Phœnix Bank *v.* Risley, 111 U. S. 125; Planters' Bank *v.* Union Bank, 16 Wall. 483; Boyden *v.* Bank of Cape Fear, 65 N. C. 13; McGregor *v.* Loomis, 1 Disney (Ohio), 247; Perley *v.* Muskegon County, 32 Mich. 132; Neely *v.* Rood, 54 Mich. 134; Knecht *v.* United States Savings Institution, (1876) 2 Mo. App. 563; Union Bank *v.* Tutt, (1878) 5 Mo. App. 342; State *v.* Keim, 8 Neb. 63, 67; First National Bank *v.* Gandy, 11 Neb. 431, 434; Seward County *v.* Cattle, 14 Neb. 149; Longbottom's Exrs. *v.* Babcock, 9 La. 50; Grant *v.* Fiol, 17 La. 162; Wall *v.* Spur-

itor, or it is made expressly in some particular capacity by him. On a general deposit there will be an implied promise on the part of the bank receiving it to restore not the same funds, but an equivalent sum when demanded.[1] This liability to pay out the same on the checks of the depositor is implied by the law, without a special contract to that effect.[2] The law implies, also, that where a bank receives bank notes for deposit, in the absence of any agreement to the contrary, that the bank takes them at its own risk.[3] And even though a bank should take bank notes with the understanding that the risk of their being good was to rest upon the depositor, yet, it is the duty of the bank, upon knowledge of the insolvency of the bank issuing the notes, to give legal notice of the fact to the depositor; and a failure to notify him will not be excused by the depositor's having knowledge of the fact.[4] A bank receiving a sum of money on deposit generally, must account to the depositor for the amount in good funds, and a local custom of bankers would not be admissible in evidence, to change the liability of the bank.[5] Whenever the relation of debtor and creditor exists between the bank and a depositor, the bank will be liable for any depreciation of the currency.[6] Where money is collected and mixed up with the general funds

lock, 10 La. 342; In re Louisiana Savings Bank, 40 La. Ann. 514. That money, checks or bill deposited by a general depositor in a bank become the property of the bank, and the relation of debtor and creditor between the bank and depositor is thereby created, see Matter of Franklin Bank, (1828) 1 Paige Ch. 249; Chapman *v.* White, (1852) 6 N. Y. 412; Commercial Bank of Albany *v.* Hughes, (1837) 17 Wend. 94; Marsh *v.* Oneida Central Bank (1861) 34 Barb. 298; Ætna National Bank *v.* Fourth National Bank, (1871) 46 N. Y. 82. Under what circumstances the trustee of a school district by a deposit in bank becomes the creditor of the bank, see Union School Township *v.* First National Bank, (1885) 102 Ind. 464.

[1] Brahm *v.* Adkins, 77 Ill. 263; McEwen *v.* Davis, 39 Ind. 109.

[2] Thompson *v.* Riggs, 6 D. C. 99.

[3] Corbit *v.* Bank of Smyrna, 2 Harr. (Del.) 235.

[4] Ibid.

[5] Marine Bank of Chicago *v.* Birney, 28 Ill. 90.

[6] Marine Bank of Chicago *v.* Chandler, 27 Ill. 525. In Kupfer *v.* Bank of Galena, (1864) 34 Ill. 329, a deposit of gold coin had been made in the bank prior to the passage of the "legal tender" laws by congress, and had been drawn out by checks paid in treasury notes. The Supreme Court of Illinois held that the bank was responsible for the value of the coin as compared with the notes in which the drafts or checks on this deposit were paid. As to the right to pay in treasury notes of the United States where the deposit was made in gold or other coin, see Thompson *v.* Riggs, 6 D. C. 99.

of a bank it becomes a general deposit to the credit of the party for whom the collection was made, and is governed by the rules which obtain in ordinary cases of deposit of money with banks.[1] In such case, therefore, should the funds after such mingling become depreciated, the bank must sustain the loss and not the one for whom the collections were made.[2] Where a depositor makes a deposit with a bank to his credit, with instructions to apply it to the payment of a claim against him held for collection, there must be an actual appropriation of the money for that purpose before it will operate a payment of the claim. Until this is done the instructions may be countermanded. The money deposited is the money of the bank and the depositor may draw upon it or direct its appropriation in some other way.[3] When a bank, in the ordinary transaction of its business, receives money on general deposit, the money thereby becomes the property of the bank and the bank becomes debtor to the depositor for the amount as so much money had and received, and any subsequent loss of the money or destruction of its value, falls on the bank. The depositor is only a creditor of the bank.[4] If the bank fail, and be unable to pay its debts in full, the depositor comes in only as a general creditor and can only receive his *pro rata* share of the assets.[5] Where money is deposited with a bank by a board of officials in their official relation, when superseded by the appointment of a new board, the money becomes subject to the check of the new board.[6] A banking corporation taking from another an assignment of all of its property, on, as a consideration, agreeing to pay all of the debts and liabilities of this other, and proceeding to conduct the business of banking, and crediting a depositor of the former with the amount of his deposit upon its own books of account, thereby assumes the relation to the depositor which the former owes to him.[7] The receipt of a cashier of a bank is evidence of a deposit in a bank.[8] In a New York case where a bookkeeper in the bank, as well as bookkeeper for one of

[1] Marine Bank of Chicago *v.* Rushmore, 28 Ill. 463.

[2] Ibid.

[3] Moore *v.* Meyer, 57 Ala. 20.

[4] Henry *v.* North. Bank of Ala., 63 Ala. 527.

[5] Ibid.

[6] Carman *v.* President & Directors of the Franklin Bank of Baltimore, (1883) 61 Md. 467. The court refers to and comments upon Lewis *v.* Park Bank, 42 N. Y. 463, and Swartwout *v.* Mechanics' Bank of New York, 5 Denio, 555.

[7] Green *v.* Odd Fellows' Savings & Commercial Bank, (1884) 65 Cal. 71.

[8] State Bank *v.* Kain, Breese (Ill.), 75.

the bank's depositors, received from the latter money for the purpose of depositing it in bank, entered the amount in the ledger of the bank and in the depositor's bank book, but the money was not received by the latter nor entered in the cash book, it was held that in making the deposit the bookkeeper was the agent of the depositor and not of the bank, and that the bank was not accountable for the money intrusted by the depositor to the bookkeeper for deposit.[1] A credit on the books of a bank for a general deposit is an acknowledgment of the receipt of so much money.[2] A paper headed with the names of bankers, showing that a party had made a deposit with them, stating the amount thereof, and signed by them, has been held to be *bona fide* evidence of a general deposit against the bankers.[3] A pass book, given by a bank to a depositor, is not a written contract but is *prima facie* evidence that the bank has received the amounts on the dates therein stated, and binds the bank like any other form of receipt, and is open to explanation by evidence *aliunde*.[4] Should a bank receive the deposit of a minor it must honor his checks.[5] Should a bank credit a depositor with the amount of a check drawn upon it by another of its customers, and there be no want of good faith upon the part of the depositor, the act of crediting would be equivalent to a payment in money. And a bank, it has been held, could not recall or repudiate the payment, because, upon an examination of the accounts of the drawer, it was ascertained that he was without funds to meet the check, though when the payment was made the officer making it labored under the mistake that there were funds sufficient.[6] A check left with a bank for collection and credited to the depos-

[1] Manhattan Co. *v.* Lydig, (1809) 4 Johns. 377.

[2] Corbit *v.* Bank of Smyrna, 2 Harr. (Del.) 235. Whether a bank can go behind its cashier's entry on a depositor's bank book to prove that the amount deposited was a smaller sum has been queried in Johnson *v.* Farmers' Bank, 1 Harr. (Del.) 117.

[3] Brahm *v.* Adkins, 77 Ill. 263.

[4] Talcott *v.* First Nat. Bank of Larned, (Kans. 1894) 36 Pac. Rep. 1066. See Davis *v.* Bank, 53 Mich. 163; s. c., 18 N. W. Rep. 629; Bank *v.* Smith, 19 Johns. 116; Asher *v.* Bank, 7 Alb. Law J. 43; Anderson *v.* Leverick, (Iowa) 30 N. W. Rep. 39. The court distinguished Jassoy *v.* Horn, 64 Ill. 379, and Long *v.* Straus, 107 Ind. 94; s. c., 6 N. E. Rep. 123, and 7 N. E. Rep. 763.

[5] Bank *v.* Headley, 17 W. N. C. (Pa.) 557.

[6] City National Bank *v.* Burns, (1880) 68 Ala. 267; citing Chambers *v.* Miller, 13 C. B. (N. S.) 125; Levy *v.* U. S. Bank, 4 Dall. 234; Oddie *v.* National Bank, 45 N. Y. 735; s. c., 6 Am. Rep. 160; Bolton *v.* Richard, 6 Term Rep. 139; National Bank *v.* Burkhardt,

itor may be charged back to him in case the check proves a fraudulent one.[1] Where commercial paper is delivered to a bank under an arrangement that the depositor be allowed to draw against it, the paper becomes the property of the bank, and the depositor cannot thereafter claim it.[2] The mere discounting of paper and placing the amount thereof to the credit of a depositor who already has a large balance to his credit, will not make the bank a purchaser for value so as to protect it against infirmities in the paper. Entering the amount of the discount to the credit of the depositor simply creates the relation between the bank and depositor of debtor and creditor; and, as long as that relation remains and the deposit is not drawn out, the bank has simply promised to pay; the depositor has parted with no value and would not be entitled to the protection of a *bona fide* holder of paper.[3] But while the mere discounting of paper by a bank and placing the amount thereof to the credit of a depositor having already a balance to his credit will not constitute the bank a purchaser for value so as to cut off equities, yet, as by the discount and credit, it becomes a debtor to the depositor if before receiving notice of any infirmity in the paper it pays out on the checks of the depositor the full amount due him, including the discount, the bank thereby will become a purchaser for value so as to be entitled to full protection.[4] This rule would obtain though the depositor, by subsequent deposits or discounts, preserve a constant balance to his credit, for, in the absence of special facts demanding a different rule, payments are applied to the oldest debts.[5] The fact that the depositor be itself a bank and the regular correspondent of the discounting bank would not change the rules as already stated.[6]

100 U. S. 686. The Alabama court distinguished Boyd *v.* Emmerson, 2 Ad. & Ell. 184, and Kilsby *v.* Williams, 5 Barn. & Ald. 815. See on the subject of drawing checks, Martin *v.* Morgan, Gow, 123; s. c., 3 J. B. Moore, 635; Peterson *v.* Union National Bank, 52 Pa. St. 206; National Gold Bank & Trust Co. *v.* McDonald, 51 Cal. 64; s. c., 21 Am. Rep. 697.

[1] Rapp *v.* Bank, 26 W. N. C. (Pa.) 458.

[2] Flannery *v.* Coates, (1883) 80 Mo. 444; Ayres *v.* Bank, (1883) 79 Mo. 421; Bullene *v.* Coates, (1883) 79 Mo. 426; Armstrong *v.* Exchange National Bank, 133 U. S. 433. When bankers will not be held liable as guarantors of a deposit made with other bankers, see Dustin & Musick *v.* Hodgen, (1868) 47 Ill. 125.

[3] Munn *v.* Second National Bank, (1883) 30 Kans. 412.

[4] Fox *v.* Bank of Kansas City, (1883) 30 Kans. 441.

[5] Ibid.

[6] Ibid. As to what constitutes a legal deposit of money in a bank and

§ 316. Depositors — duty and rights.— Depositors must know and conform to the ordinary usage of business of the bank.[1] Where one of two partners carrying on business in his own name deposits moneys of the firm in his own name in bank, the other partner will have the right, during the lifetime of his partner, to change the account, placing it to the credit of the firm, and after his death to draw against it as surviving partner.[2] Though a depositor's account may be deemed balanced, and the lapse of time be such that as a whole account it cannot be opened, yet particular items may be shown to be false.[3] A depositor is not precluded by a rule of a bank, that all payments made and received must be examined at the time, from showing afterwards that there was a mistake made in the entry of his deposit.[4] Neither will he be concluded by entries made in his deposit book by the bank in writing up his account if he has made objection to it within a reasonable time after the account was written up.[5] Where the entry of a deposit was made by the teller of a bank, and the amount was erroneously stated to him by the depositor's clerk, and the depositor questioned its correctness on the day of the deposit, as soon as he discovered a mistake had been made, the Supreme Court of New York held that the depositor should be allowed to recover from the bank the difference between the amount entered and the true amount.[6] The United States Supreme Court has held that a depositor in a bank was estopped to question the correctness of his bank account by omission to examine entries in his pass book and vouchers returned, and to report errors.[7] They also held that a depositor intrusting exami-

the bank's liability, see Jackson Insurance Co. *v.* Cross, (1872) 9 Heisk. (Tenn.) 283.

[1] American National Bank *v.* Bushey, 45 Mich. 135. As to the effect of usage of the bank upon other parties, see Leavitt *v.* Simes, 3 N. H. 14; Piscataqua Bank *v.* Carter, 20 N. H. 246, 248; Moore *v.* Waitt, 13 N. H. 415; Crosby *v.* Wyatt, 10 N. H. 318.

[2] Commercial National Bank *v.* Proctor, (1881) 98 Ill. 558.

[3] Manhattan Co. *v.* Lydig, (1809) 4 Johns. 377.

[4] Mechanics & Farmers' Bank *v.* Smith, (1821) 19 Johns. 115.

[5] Schneider *v.* Irving Bank, (1865) 1 Daly, 500; s. c., 30 How. Pr. 190. See Godin *v.* Bank of the Commonwealth, 6 Duer, 76, as to what amounts to an accounting between a bank and a depositor which will bind the latter.

[6] Mechanics & Farmers' Bank *v.* Smith, (1821) 19 Johns. 115. In Winter *v.* Bank of New York, 2 Caines, 337, a bank was held liable to the true depositor, though the deposit had been partly credited to one who falsely claimed to be the depositor, and the bank had parted with value to him on it.

[7] Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96.

nation of his bank account and vouchers to his clerk, without proper supervision, was liable for loss by the clerk's forgeries, where the bank had used due care.[1] A check drawn by a depositor, never accepted and not accounted for, would be no obstacle to a suit for the deposit.[2] In an action against a depositor for an overdraft he may set off coupons, payable to bearer, for which the bank may be liable.[3] Should a depositor on the same day of his deposit, and before it is placed to his credit on the books of the bank, direct the cashier to change the deposit to the credit of another, which is done, and the money be drawn out on the checks of the latter, the depositor will not be allowed to recover the amount of the deposit from the bank.[4] As a general rule, deposits of money in bank, subject to the checks of the depositor, draw no interest. It seems that if there should be unreasonable and vexatious delay in payment the depositor may demand interest.[5] In an Illinois case it appeared that a depositor in a bank, expecting to be absent for a short time, gave his clerk and bookkeeper a power of attorney to draw checks on the bank against deposits for fifteen days only, and placed the power of attorney with the bank. After his return he resumed drawing his own checks. But after the expiration of fifteen days the clerk contrived to draw checks without the knowledge of the depositor, a part of which he applied to the business of his employer and appropriated the balance to his own use. In the depositor's suit against the bank to recover his deposits, the Supreme Court held that the bank was liable to the depositor for the moneys paid out on the checks drawn by the clerk after his agency ceased, so far

[1] Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96.

[2] Jackson Insurance Co. *v.* Cross, (1872) 9 Heisk. (Tenn.) 283.

[3] Bank of the United States *v.* Macalester, 9 Pa. St. 475.

[4] Neff *v.* Greene County National Bank, (1886) 89 Mo. 581.

[5] First National Bank of Springfield *v.* Coleman, (1882) 11 Bradw. (Ill.) 508. The court said: "It cannot be said that there has been any unreasonable and vexatious delay, unless the debtor has thrown some obstacle in the way, or, by some management of his own, induced the creditor to prolong the term of proceeding against him. Sammis *v.* Clark, 13 Ill. 544; Hitt *v.* Allen, 13 Ill. 592. And the defending in good faith of a suit brought for the recovery of the money is not a vexatious delay. Aldrich *v.* Dunham, 16 Ill. 403." In Jassoy *v.* Horn, (1872) 64 Ill. 379, where payment of an account evidenced by the entries in a depositor's book had been repeatedly demanded and ten years had elapsed after the deposit of the money, the Illinois Supreme Court held that the delay of payment was vexatious and unreasonable and that interest should be allowed on the account.

as he had appropriated them to his own use.[1] It was insisted before the court that the court before which this case was tried had erred in rendering judgment for any greater sum than the amount checked out by the clerk before the bank book or pass book of the depositor was written up the first time, when all the checks were returned to the depositor. It was claimed that from that date, at least, the bank had the right to presume that the clerk had authority to draw checks. The Supreme Court, however, affirmed the judgment.[2] In a case where a bank received a deposit of a check under an agreement that the check should be paid out of the first unappropriated funds of the drawer that came in, and large sums came in from the drawer, but all appropriated, the bank was held not liable upon its agreement.[3] There must be a demand for payment before a suit can be brought against a bank for a deposit.[4] And this demand previous to a suit is indispensable to the maintenance of a suit for such deposit, unless circumstances are shown which amount to a legal excuse for not making such demand.[5] A depositor, however, would have an immediate cause of action against a bank and its stockholders for the amount of his deposit upon stoppage of payment by the bank.[6] An action against the bank cannot be maintained

[1] Manufacturers' National Bank *v.* Barnes, (1872) 65 Ill. 69.

[2] Ibid. The court said: "The same question arose in the case of Weisser *v.* Denison, 10 N. Y. 68. There, as here, a clerk had drawn checks in the name of his employer, and the pass book had been several times written up and the checks returned before discovery of the fraud. The court held that the balancing of the pass book and the return of the checks are for the protection of the depositor, and not for that of the bank, and the failure of the depositor to examine the checks is not such negligence on his part as to exonerate the bank from liability for the continued payment of checks improperly drawn. * * * The facts that the plaintiff [in the case before us] had been thus careful to give the clerk express written authority, and to limit it to fifteen days, and to lodge this authority with the bank, in pursuance of a previous arrangement, were sufficient to show the bank that the plaintiff had no intention of giving to the clerk a general authority to draw. The bank was guilty of great negligence in paying checks of the clerk drawn after that period, and cannot be excused merely because the plaintiff failed to examine the returned checks, which he had a right to presume had been drawn by himself alone. We consider the reasoning of the New York Court of Appeals, in the case cited, very satisfactory, and adopt its decision as the better rule."

[3] Johnston *v.* Bank, 101 Pa. St. 600.

[4] Downes *v.* Phœnix Bank, (1844) 6 Hill, 297.

[5] Brahm *v.* Adkins, 77 Ill. 263.

[6] Mitchell *v.* Beckman, (1883) 64 Cal. 117.

upon a certificate of deposit issued to one, "subject to order of himself * * * and payable on return of this certificate" before a demand for payment and a refusal to pay.[1] A depositor will be relieved from demanding the payment of his deposit as preliminary to the right to sue, by a notice from the bank, or by an advertisement, that his claim would not be paid at the counter.[2] Upon the suspension of a national bank and the appointment of a receiver, a depositor in the bank, from the date of his demand for it, will be entitled to interest on his deposit.[3] Where money may be deposited by the drawee in a bank to pay a certain draft, not there at the time, the drawers would have no interest on the money until the application to their draft is made. The drawee may revoke his direction at any time before the money is so applied.[4] In an Indiana case one who wished a loan of money employed a firm to negotiate it for him. They applied to another firm, who procured the money from their principal, a security company, and deposited it in bank. Soon afterwards the first party executed his note and mortgage for the amount and delivered them to the firm who had procured the money, and they, in turn, left a check on the bank, with one of the firm first named, to be delivered to the first party when he obtained the release of prior incumbrances on his land, which he agreed to do at a certain time. He did not carry out the agreement at the time fixed, nor subsequently, and ten days later, while the check was still in the keeping of others, the bank on which it was drawn failed. The court held that the loss was not his, and that he could maintain an action against the security company for the surrender and cancellation of the note and mortgage.[5] One keeping an account with a banking house, depositing funds which are at the time current, has a right to insist upon payment in current funds, although the funds deposited may, in the meantime, have depreciated in value.[6] There has been a case before the Supreme

[1] Brown *v.* McElroy, (1876) 52 Ind. 404.

[2] Farmers & Mechanics' Bank *v.* Planters' Bank, 10 G. & J. (Md.) 422. That demand must be made for payment of deposit before action to recover it, see National Bank of Fort Edward *v.* Washington County National Bank, (1875) 5 Hun, 605.

[3] National Bank *v.* Mechanics' National Bank, 94 U. S. 437.

[4] Bank *v.* Higbee, 109 Pa. St. 130.

[5] Security Company *v.* Ball, (1886) 107 Ind. 165.

[6] Willetts *v.* Paine, (1867) 43 Ill. 432.

Court of Michigan in which it appeared that the two members of a firm joined in a letter to the bank, in which the firm kept an account, instructing it to pay no checks on the part of the firm unless they were countersigned by a son of one of the partners, who was the bookkeeper of the firm. The other partner made an arrangement with the bank by which he was to get money for their business at another point where he conducted it. He drew a number of checks in the name of the firm at different times which were not countersigned by the bookkeeper. A check drawn in this way finally came back to the bank not paid, and was charged up to the firm. For overdrafts on this account the bank brought its action against the firm. On the trial of this action there was no showing by the bank that the firm derived any benefit from the moneys received upon these checks, it resting its claim upon the contract implied from the signing of the checks in the firm name. The majority of the court affirmed the judgment of the trial court in favor of the firm.[1] A person

[1] Gladstone Exchange Bank *v.* Keating, (1892) 94 Mich. 429. MONTGOMERY, J., speaking for the majority, said: "It is suggested that the burden of proof would rest upon the defendants to show that the moneys did not go to the benefit of the firm. In my judgment, this is not the correct rule in such a case. The [bank] seeks to recover, notwithstanding it appears affirmatively that the money was paid out by it upon checks which were drawn without the requisite authority of the firm. There can be no doubt about the power of either member of a copartnership to protect himself by stipulating that the other member shall not have the authority to bind the firm by signing checks, if notice is given to the bank which is the depository of the firm; and when, on the affirmative showing of the bank, as in this case, it appears that the bank has disregarded the notice, how can it be said that a *prima facie* case is shown, without further showing that some benefit was derived by the firm from the payment of the money? It is suggested in the case that the defendants are estopped from relying upon this defense, for the reason that there was an opportunity for an examination of the account and checks, and that the defendants should have examined these checks, and notified the [bank] of the excess of authority and of the invalidity of the checks." The case of Bank *v.* Morgan, 117 U. S. 96, cited to sustain this position, was distinguished in the opinion of the Michigan Supreme Court, as follows: "But in the case cited, the party drawing the check had *prima facie* authority to draw it; the bank acted in good faith in making the payment; the check passed back into the hands of the drawer, with opportunity to examine and observe the error; it appeared charged in the account of the drawer. Under these circumstances, it was held that there was a duty to notify the bank, in order that it might protect itself. But what notice was requisite in this case to enable the bank to protect itself? The moment it paid one of these checks, its officers knew from direct notifica-

depositing money with one bank, to be transmitted for his use and benefit to another bank, which refuses or is unable to receive it, and cannot be compelled to receive it, the purpose of the deposit failing, the bank so receiving the same will hold it to the use of the depositor, and must account to him for it. Money so deposited and expressed in the certificate of deposit, to be forwarded in the usual course of business, cannot be regarded as assets of the bank to which it was to be remitted, and the bank receiving the deposit cannot apply the same in payment of debts due from the correspondent bank, nor would such money be subject to garnishment at the suit of creditors of that bank.[1]

§ 317. **When ownership of deposit is questioned — rules.**— In a controversy over the right to a bank deposit where it is denied that the depositor was the owner of the fund, and entitled to draw the same from the bank, it may be shown that the ownership of the deposit is in another, and that a payment to him releases the bank from liability.[2] A receiver of a corporation appointed upon the removal of a former receiver drawing a check upon the bank, where the receiver's deposits of funds had been made for a supposed balance due on that account, the bank declined to pay it on the ground that there was no such balance. The evidence showed the payment of a check by the former receiver drawn to an individual for the amount of money received by him belonging to her and deposited to the credit of the receiver's account. In an action upon the protested check the bank had judgment in its favor. Upon appeal the Maryland Court of Appeals affirmed this judgment, holding that where such a receiver had deposited to his credit, as receiver, money belonging to an individual, the corporation was under obligation to repay such person, and was, therefore, not prejudiced by the

tion that they were violating the express instructions and directions of defendants. Why notify them of what they already knew? If either party was entitled to notice of this transaction from the other, it was certainly the two defendants, as individuals, who were entitled to notice from the bank that some person connected with the firm was assuming to violate the express instructions of the firm, of which the bank, as well as the defendants, was apprised." GRANT, J., dissented on each of the points just discussed.

[1] Drovers' National Bank *v.* O'Hare, (1887) 119 Ill. 646; s. c., 10 N. E. Rep. 360; followed in Union Stock Yards Nat. Bank *v.* Dumond, (1894) 150 Ill. 501; s. c., 37 N. E. Rep. 863.

[2] Wichita Nat. Bank *v.* Maltby, (Kans. 1894) 36 Pac. Rep. 1000.

giving of a check by the receiver to the individual in payment of the obligation.[1] Neither the bank nor the attorney can deny that money deposited by the depositor as attorney for another belongs to the latter.[2] Money credited to a depositor may be shown to be the property of a third person and be reached by attachment against the latter, or he may stop payment by proper notice. In the absence of any extrinsic claim, however, to the money the bank would be bound to honor the depositor's check.[3] In the absence of proof of fraud a deposit in the name of a third person is *prima facie* a payment of a debt due him, and the third person's ownership will be good as against all other persons.[4] The *prima facie* presumption is that money deposited in a bank belongs to the person in whose name it may have been deposited; if claimed by another person the burden of proof would be upon him to establish his ownership.[5] And a bank will not be permitted to allege that money received by it from a depositor belongs to some one else.[6] In an Ohio case a party deposited money in one bank to the credit of another bank, but, without knowledge of the latter, took a letter from the bank securing the deposit, addressed to the one credited with the deposit, advising it of the deposit, and afterwards delivered the letter to a third person, with his own name indorsed on the letter in blank, for presentation to the bank credited with the deposit. The court held that, as between the depositor and the latter bank, the bearer of the letter had authority to control the fund, and, for that purpose, to write a check or order over the blank signature; also, it was held that the fact that this bank held the note of the party making the deposit, then overdue, did not constitute a notice that the fund was to be applied to the payment of this note.[7]

[1] Eccles *v.* Drovers & Mechanics' Nat. Bank, (Md. 1894) 29 Atl. Rep. 963.

[2] Burger *v.* Burger, 135 Pa. St. 499; s. c., 26 W. N. C. (Pa.) 355.

[3] Hemphill *v.* Yerkes, 132 Pa. St. 545; s. c., 25 W. N. C. (Pa.) 417.

[4] Ferry *v.* McKenna, 9 Pa. Co. Ct. Rep. 17.

[5] Egbert *v.* Payne, 99 Pa. St. 244.

[6] Bank *v.* Alexander, 120 Pa. St. 476.

[7] Weirick *v.* Mahoning County Bank, (1866) 16 Ohio St. 296. See Ring & Rice *v.* Foster, 6 Ohio, 279; Mitchel *v.* McCabe, 10 Ohio, 405; Moore *v.* Gano, 12 Ohio, 300; Howe *v.* Hartness, Hill & Co., 11 Ohio St. 449; Cornwell *v.* Kinney, 1 Handy (Ohio), 496; Fullerton *v.* Sturges, 4 Ohio St. 529; Putnam *v.* Sullivan, 4 Mass. 45; Selser *v.* Brock, 3 Ohio St. 307. In Tradesmen's Bank *v.* Astor, (1833) 11 Wend. 87, the facts were that the president of the bank became treasurer of a voluntary association, and as treasurer opened an account with the bank, depositing the

A bank cannot claim a lien upon a bank account opened with it by one as the general agent, when it knows that he is agent of a corporation, for an individual debt of the depositor to the bank.[1] A factor depositing money in a bank which has knowledge that it is the proceeds of sales of goods for his principal's account, and the principal's ownership, the bank will not be allowed, as against the principal, to appropriate the deposit to payment of a general balance due from the factor to the bank.[2] A bank refusing, without cause, to honor a depositor's check has been held liable for substantial damages, though no special loss was shown.[3] In case a bank, with which an agent or trustee has deposited money belonging to his principal or beneficiary, without his authority, and in ignorance of the true ownership of the fund, applies the deposit to a debt which the depositor may owe it, the owner would not be debarred by that fact from recovering the money from the bank if it can be identified.[4] The rule that a trustee may follow trust property as long as it can be traced has no application in an action to recover money as a general deposit in a bank.[5] As against a depositor, a bank cannot allege that the fund in its hands belongs to a third person against whom the bank has a counterclaim.[6] A bank would not be authorized to pay out money on check of a depositor in his individual name where the deposit has been credited to him as trustee.[7] The money belonging to a county deposited by a county treasurer in a bank in his name as "treasurer," no money of the treasurer being mixed with it, upon his becoming a bankrupt, belongs to the county, and it would be no defense in an action against the bank to recover the deposit that it had been paid to the assignee in bankruptcy of the treasurer.[8] There is justification for payment by a bank of money upon orders of the one depositing the money or his agent, until notice

funds of the association therein, which account he overdrew. It was held that the bank could recover the amount overdrawn from the members of the association as he drew upon the account as the agent of the association.

[1] National Bank v. Insurance Co., 104 U. S. 54.

[2] Union Stock Yards Bank v. Gillespie, 137 U. S. 411.

[3] Patterson v. Bank, 130 Pa. St. 419.

[4] Burtnett v. First National Bank, 38 Mich. 630.

[5] McLain v. Wallace, (1885) 103 Ind. 562.

[6] Bank v. Mason, 95 Pa. St. 113.

[7] Ihl v. Bank of St. Joseph, (1887) 26 Mo. App. 129.

[8] Supervisors of Schuyler County v. Bank of Havana, (1875) 5 Hun, 649.

is received of an adverse claim of ownership of the funds.[1] Where a bank is notified of adverse claims to a deposit, as that a depositor has parted with his interest, and others have succeeded to his rights by his act or through operation of law, the bank would not be justified in paying the depositor.[2] When a bank is enjoined by a court from paying the sum deposited with it, either to the depositor or to his assignee, it is its duty to obey the mandate of the court, and not to pay out the funds deposited with it until the parties claiming the same can have an opportunity to contest, by interpleader or otherwise, the good faith of the assignment.[3] Should a bank pay to any person other than the depositor the money he may have deposited with it, the bank would be required to show not only that the money did not belong to the depositor, but that it did belong to the person to whom it was paid.[4] Where money belonging to one person had been deposited in a bank in the name of another, the bank's payment to the committee of the real owner of the money (the owner having became a lunatic) was held by the New York Court of Appeals to have been legal and to have discharged the bank, and that it was a protection against the equitable claim of a third person to whom the one in whose name the money was deposited had given a check, of which facts the bank had no notice.[5]

§ 318. The passing of title by deposit of a check.— Whether the title to a check deposited with a bank passes to the bank before collection, so as to immediately create the relation of debtor and creditor between the bank and a depositor, is a question of fact depending upon the circumstances and course of dealing in each particular case. Here certain checks marked "For deposit" were deposited in a bank at a quarter to three on Saturday, and credit was immediately given for the amount of the checks on the pass book of the depositor. The bank closed at three and the next day was declared insolvent with the checks still in its hands. The custom of the bank was, at the close of

[1] McEwen v. Davis, (1872) 39 Ind. 109.

[2] German Exchange Bank v. Commissioners of Excise, (Sup. Ct. N. Y. Spl. Term, 1879) 6 Abb. N. C. 394.

[3] Springfield Marine & Fire Ins. Co. v. Peck, (1882) 102 Ill. 265.

[4] Patterson v. Bank 130 Pa. St. 419.

[5] Viets v. Union National Bank of Troy, (1886) 101 N. Y. 563.

each day's business, to balance its books, crediting depositors with the amount of their checks, and, if a check was subsequently returned unpaid from the clearing house, it was charged off to the depositors. This depositor did not know of this custom. He had made deposits with the bank for several years without any special arrangement, and had never drawn against uncollected checks, except by particular understanding. On these facts the United States Circuit Court for the district of Massachusetts held that title had passed to the bank so as to create the relation of debtor and creditor. But these facts being alleged in the depositor's bill against the receiver of the insolvent bank, and connected with further allegations that, at the time the checks were received, the bank was "irretrievably insolvent, and made so by the operations of the president and two others of the directors," and that the depositor then believed it to be solvent, and had no means of knowing of its insolvency, the court held this was sufficient to show fraud, and to render the bank liable to return the checks or their proceeds. Further, it was not necessary for the bill to specifically allege that the officers of the bank had knowledge of its insolvency, since such knowledge would be implied from the allegation that the insolvency was caused by the president and two of the directors.[1] This case was on appeal before the United States Circuit Court of Appeals for the first circuit, and that court held that, under the circumstances of the case, no title passed to the bank by the deposit of the check "For collection," and that the depositor was entitled to the proceds of the check collected and passing to the receiver of the bank then insolvent.[2] One corporation which had

[1] City of Somerville *v.* Beal, Receiver, (1892) 49 Fed. Rep. 790.

[2] Beal, Receiver, *v.* City of Somerville, (1892) 50 Fed. Rep. 647. The opinion of PUTNAM, Circuit Judge, is an elaborate one, and it so learnedly discusses the whole question and so distinguishes the cases on this subject that we give it in this note. He said: "The fact that the checks were expressly indorsed 'For deposit,' does not change the nature of what occurred in this instance, as there are no intervening equities, although it emphasizes it. The paying of actual money by a customer into a bank of deposit does not create a bailment, because, by the settled customs, recognized by the Supreme Court of the United States, the House of Lords and numerous other courts, the bank is authorized to mingle the money at once with its general fund, creating immediately the relation of debtor and creditor, subject by further custom to draft in the usual course of business. But, with reference to the checks claimed by the city of Somer-

deposited a sight bill drawn upon another indebted to it in another city in a bank in which it kept its account, and the bank had credited it to the corporation on its books as a cash item, and the bank, which was insolvent at the time, forwarded the bill to its correspondent in the other city, who collected the same after the bank had failed and closed its doors, brought an action in the federal court for the southern district of New York against the

ville, the word by which the transactions ordinarily described may conveniently have, and, therefore, should have, its full natural force and meaning. A mere deposit would only require a bank to keep; but a usage requiring the Maverick to do in this case something more has continued so long, and is so notorious and universal, that the law can take judicial notice of it, and it happens that its terms and limitations cannot be mistaken. The bank must use due diligence to collect, and as collections are completed, the bank no longer holds the avails as bailee, but is authorized to mingle them with its other funds, and thus constitute itself a debtor. This, of course, makes the entire transaction something more than a mere deposit, in any proper sense, but this word well gives color to all that follows, and converts all that is due between the customer and the bank to and including the actual turning of the checks into money, into *locatio operis*, according to its meaning as explained by Judge STORY in his work on Bailments, chap. 6, art. 2. Aside from the right of the bank to constitute itself a debtor from the time the checks are converted into cash, or its equivalent, instead of a mere trustee or agent, no qualification of the strict legal relations created by a bailment is deducible from the general nature of the transaction, the terms in which it is expressed, or the settled custom, or is shown by the appellant. * * * The first impression coming from the fact that the deposit was immediately entered to the credit of the city in its pass book favors the view of the appellant; but a careful consideration will demonstrate that this was a mere matter of convenience, and the entry would have been the same on either theory, as was illustrated in Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553; s. c., 20 N. E. Rep. 193, and Railway Co. *v.* Johnston, 133 U. S. 566; s. c., 10 Sup. Ct. Rep. 390. On the other hand, the appellant fails to show that the city had an absolute right to check against the deposit as soon as made, irrevocable by notice from the bank; and that such right did not exist must be received by this court as a matter of judicial knowledge, notwithstanding the parties in Moors *v.* Goddard, 147 Mass. 287; s. c., 17 N. E. Rep. 532, and the complainant in this case seem to have regarded it necessary to prove the practice of a particular bank with reference to this matter. This is inconsistent with any theory except that the bank is a bailee of deposited checks until they are collected; as is also the admitted fact that the bank is entitled to return to its customer an uncollectible check, though he neither indorses it nor gives any special agreement to that effect. The appellant fails to show any obligation to receive back such checks, unless from special custom; and it is more in harmony with fundamental principles to presume that this right to return grows out of the former than the latter. It strains the law to convert the natural incidents of a bailment into a right of an entirely

receiver of the bank to recover the sum collected on this sight bill. The question in the case was whether the draft belonged to the plaintiff at the time it was paid by the drawee. If it did the defendant did not acquire title to the money. If the transaction in controversy was equivalent to a discount of the draft the bank acquired the title to the paper; if it was not, the bank merely became the agent of the plaintiff to collect the proceeds. The

different character, to be sustained, if at all, by a custom violative of the ordinary rules governing analogous transactions. No authorities have been cited or found which bind this court to the contrary of what is hereinbefore expressed. Railway Co. *v.* Johnston, 133 U. S. 566; s. c., 10 Sup. Ct. Rep. 390, is not in point, as the paper in question in that case was not a check, but a sight draft, and the decision was made to rest mainly on the ground of fraud, as was stated by the learned judge from whose decree in the Circuit Court this appeal was taken. Ex parte Richdale, 19 Ch. Div. 409, is criticized in Balbach *v.* Frelinghuysen, 15 Fed. Rep. 675. It can be added to what is there said that so far as the case touches this at bar, the different judges who sat in the Court of Appeal used essentially varying expressions, all of which were unnecessary, beyond the proposition that the banker there in question was, under the special circumstances, a holder for value. Bank *v.* Loyd, 90 N. Y. 530, so much relied on as establishing an absolute title in the bank from the instant the checks were deposited, may perhaps settle the law for the state of New York. It apparently was so considered by Judge WALLACE as late as 1886, as stated in Railway Co. *v.* Johnston, 27 Fed. Rep. 243. The law of New York was especially found by the Supreme Court of Massachusetts to be as stated in Bank *v.* Loyd, in Brooks *v.* Bigelow, 142 Mass. 6; s. c., 6 N. E. Rep. 766, and though perhaps not of importance, yet it is noteworthy that the parties deemed it necessary to prove the rule of that state as though local and peculiar, and not to be gathered from the common law. Bank *v.* Loyd is discussed by the Supreme Court in Railway Co. *v.* Johnston, already cited; and its effect is stated (page 575, 133 U. S. and page 392, 10 Sup. Ct. Rep.) to be in substance that a transfer by a bank of a draft deposited for collection and indorsed generally, would confer title by reason of 'reputed ownership.' This was the pith of the New York decision, the question being, not as to title between the primary bank and its customer, but between the latter and another bank to which the drafts had been remitted. Bank *v.* Hubbell, 117 N. Y. 384; s. c., 22 N. E. Rep. 1031 (decided November 26, 1889), can be distinguished from the case at bar only by the fact that in the former the checks were expressly indorsed 'For collection.' They were charged by the depositor to the banker simultaneously with forwarding them, and were in like manner credited at once on reception and before collection, and such as were protested were charged back. The banker did not keep the proceeds of the collections distinct, nor remit them specifically; but they were mingled with his other funds, and remittances of balances were made each week. These covered the existing credits on the books of the banker, whether or not at that time collected. This method of business had continued

bill was dismissed.[1] The mere credit of a check upon the books of a bank, which may be canceled at any time, does not make the bank a *bona fide* purchaser for value. If, after such credit, and before payment for value upon the face thereof, the holder receives notice of the insolvency of the bank, it cannot become a

for many years. Notwithstanding the checks were indorsed specially 'For collection,' the transactions as a whole were identical in substance with those usual in connection with a deposit as made in the case at bar; and the course of proceedings and the practical construction given them by the parties were precisely the same as though the checks had been indorsed generally. The special indorsements effected nothing, except to give notice to a transferee or other stranger. They were covered into the transactions, and added nothing to them, because checks delivered a banker are 'For collection' in any view. The checks were accompanied with letters stating that they were indorsed 'For collection and credit.' The court said that this amounted to a direction to credit after the collection; but the practice was to credit before, so that the letters of advice were thus actually superseded. Moreover, as already said about the word 'collection,' the word 'credit' added nothing, and was entered into the transactions, because the banker could do this in any event unless instructed to remit specially. In this case the Court of Appeals held that the title to the checks remained in the depositor while they were uncollected. In Balbach *v.* Frelinghuysen, already cited, the United States Circuit Court for the district of New Jersey laid down as the result of its conclusions the rule that a bank is, until collection, a bailee of checks deposited, or agent of its customers' depository."

[1] St. Louis & S. F. Ry. Co. *v.* Johnston, (1886) 27 Fed. Rep. 243. WALLACE, J., having stated the question involved as stated in the text, discussed it in these words: "The case of Metropolitan Nat. Bank *v.* Loyd, 90 N. Y. 531 (affirming the same case in the Supreme Court, reported in 25 Hun, 101), is an authority directly in point against the plaintiff's right to recover. In that case the plaintiff deposited with the bank a check drawn upon another bank in a different city, indorsed by him, and the amount of the check was entered by the bank upon the pass book of the depositor as cash, with the depositor's knowledge. It was held that the bank became the owner of the check. The opinions delivered in this case, both in the Court of Appeals and in the Supreme Court, are a full and able discussion of the questions involved, and contain a full review of the authorities bearing upon them. On the other hand, the case of Balbach *v.* Frelinghuysen, 15 Fed. Rep. 675, decided by the Circuit Court of the district of New Jersey, follows the views expressed in Morse on Banks and Banking (page 427), and holds that the checks so deposited do not become the property of the bank, although by the course of business between the depositor and the bank the depositor has been allowed to draw against the deposits before the paper has been actually collected. Upon principle, there is no reason why, if the parties choose to treat the deposit of such paper as a deposit of cash, the transaction should not be deemed equivalent to a discount of the paper by the bank. Sight bills drawn by one corporation upon another of prominent financial standing, like the interest coupons of such

bona fide holder by subsequent payment.[1] A national bank in Dakota, with knowledge that the county treasurer of a county had not sufficient county funds in his hands to balance his official accounts, consented to give him fictitious credit in order to enable

corporation, or like certified checks upon banks, are generally accepted in commercial usage as the equivalent of money. They have practically the same attributes as bills issued by banking corporations, which are merely promises to pay at sight, and are everywhere accepted as money, in the absence of special circumstances affecting the financial standing of the corporation issuing them. Where bank bills are credited at their face to their depositors, and are treated by the depository as a deposit of money, the bank receiving them becomes a debtor to the depositor for the face amount, although the currency may at the time be depreciated. Marine Bank *v.* Fulton Bank, 2 Wall. 252. When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper, just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper. If the customer assents to such action on the part of the bank by drawing checks against the credit, or in any other way, he manifests with equal clearness his intention to be treated as a depositor of money, and, as such, as a creditor of the bank instead of a bailor of the paper. Under such circumstances it should be held that the bank acquires title to the paper just as it would to a deposit of money. The intention of the parties in the particular transaction may be ascertained from the course of their previous dealings. When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances. It is quite certain that bankers do not invariably credit their customers for sight paper as for cash, but are generally influenced by the financial responsibility of the customer or the drawee of the paper, or both. If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper. This was done in Thompson *v.* Giles, 2 Barn. & C. 422, in the Case of Rowton, 1 Rose, 15, and in the Case of Sargeant, Id. 153. Some significance must be attached to a credit entry of the paper upon the books of the bank as cash, and the natural implication would seem to be that the bank, by making such an entry, assumes to receive the bill as money. Correlatively, if the depositor understands that the bank proposes to receive the paper as money, and assents, expressly or by acquiescence, it would seem that he consents to part with the title to the paper. For these reasons the conclusions reached in Metropolitan Nat. Bank *v.* Loyd, are adopted as satisfactory. The authorities bearing upon the general questions are so fully cited and discussed in the opinions in that case that it is deemed unnecessary for present purposes to refer to them."

[1] Dresser *v.* Missouri, etc., Construction Co., 93 U. S. 92; Mann *v.* Second National Bank, 30 Kans. 412; Central

him to impose upon the county commissioners, who were about to examine his accounts. The treasurer was given a cashier's check for a large sum, which he indorsed and took to the commissioners. They received it, but refused to discharge him or his bondsmen, and placed the check and such funds as he had in cash in a box and delivered them to his bondsmen. The latter deposited the money and the check in another bank in the same place. This last bank, as appeared by the evidence in the case, manifested a desire to get control of this check, with a view to oppress its rival bank which had issued it, and seemed to have a knowledge of how it was issued. The bank brought an action against the bank issuing it to recover the amount. The question of the *bona fide* ownership of this check, and how far the bank holding it was protected as a purchaser for value without notice, was the main one before the court. The United States Supreme Court held that the circumstances under which the check was issued were a plain fraud upon the law, and also upon the county commissioners; that the receipt of it and turning it over to the bondsmen of the county treasurer was a single act intended to assist the bondsmen in protecting themselves, and was inconsistent with the idea of releasing them from their obligations; that the question whether the evidence did or did not establish the fact that the bank in which it was deposited was an innocent holder should have been submitted to the jury.[1]

§ 319. Deposits in savings banks.— A savings bank cannot refuse to return a depositor's money to him because he deposited

National Bank *v.* Valentine, 18 Hun, 417; Manfg. National Bank *v.* Newell, 71 Wis. 309; Buller *v.* Harrison, Cowp. 565.

[1] Thompson *v.* Sioux Falls National Bank, (1893) 150 U. S. 231. As to the vesting of title in a check deposited to the credit of payee and indorsed for deposit, see Ditch *v.* Western Nat. Bank of Baltimore, (Md. 1894) 29 Atl. Rep. 72, where there is a full review of the cases upon this subject. In Security Bank of Minnesota *v.* Northwestern Fuel Co., (Minn. 1894) 59 N. W. Rep. 987, it was held that upon a deposit being made by a customer of a bank, in the ordinary course of business, of checks, drafts or other negotiable paper, received and credited on his account as money, the title to the checks, drafts or other paper immediately becomes the property of the bank, unless a different understanding affirmatively appears. Further, that an indorsement by the customer of a check payable to his own order "for deposit in the [name of the bank] to the credit of [the name of the depositor] is sufficient to pass the title to the check to the bank, and is not a restrictive or qualified indorsement." The court cite in support of its ruling

it in the name of some one else.[1] General depositors of savings banks cannot set off their deposits against their debts due the bank. The rule is different in the case of special deposits out of the ordinary course of business which the bank may have received and converted to its own use.[2] A savings bank in New Jersey, under a special charter, was authorized to receive and invest deposits for the benefit of the depositors, the income or the profit to be divided among them after reasonable deductions for necessary expenses, the principal to be repaid to the depositors at such time and with such interest and under such regulations as the board of managers should from time to time prescribe. Under their regulations they not only received deposits participating in the profits, and not payable except on thirty days' notice, but also another kind of deposits, called by them "special deposits," which were not to participate in the profits, and were to be repaid to the depositors without any preliminary notice. Both kinds of deposits were mingled in the funds of the bank indistinguishably. A receiver was appointed for the bank under insolvency proceedings. The court, as to the relations between the depositors and the bank and the rights of the different claims against the assets, held as follows: That the bank was a mere trustee for the benefit of the depositors; that a depositor who borrowed money from the bank, secured by his note or mortgage, could not set off against his debt the amount of his deposit at the time when the decree of insolvency was made; that the so-styled "special" depositors were not entitled to priority in payment over the other class of depositors; that debts and expenses contracted by the bank in carrying on its ordinary business were to be preferred; that a claim under the covenant in a lease for rent accruing after the surrender of the premises to the lessor by the receiver could not be maintained; that money paid to the bank

Bank *v.* Miller, 77 Ala. 168; Bank *v.* Smith, 132 Mass. 227; Fletcher *v.* Osbourn, (Minn.) 57 N. W. Rep. 336.

[1] Davis *v.* Lenawee County Savings Bank, 53 Mich. 163. As to deposits in savings banks by one in the name of others, see Kimball *v.* Norton, 59 N. H. 1; Blasdel *v.* Locke, 52 N. H. 238; Marcy *v.* Amazeen, 61 N. H. 131; Smith *v.* Ossipee Savings Bank, 64 N. H. 228; Bartlett *v.* Remington, 59 N. H. 364; Giles *v.* Merritt, 59 N. H. 325.

[2] Cogswell *v.* Rockingham Savings Bank, 59 N. H. 43. As to the statements in a savings bank deposit book being a part of the contract between the bank and the depositor, see Heath *v.* Portsmouth Savings Bank, 46 N. H. 78.

in exchange for its check, given for the accommodation of the payee, which was dishonored, presumably went into the funds, and the debt should be preferred ; that checks given to depositors on account of deposits were not to be preferred.[1] Money deposited with a savings institution, to be paid at certain times prescribed, may, after demand made in pursuance of the by-laws, be recovered in an action of assumpsit. It would be no defense that the institution, having, in accordance with its by-laws, invested its funds in stocks which have depreciated, was unable to repay the whole amount of the deposits.[2] Reasonable care and diligence is required of the officers of savings institutions.[3] Reasonable care and diligence do not necessarily require the disbursing officer of a savings institution to demand strict proof of the identity of the depositor in paying money on the presentment of a deposit book.[4] A deposit in a savings bank stated in the depositor's "deposit book" not made payable to order or bearer cannot be assigned so as to enable the assignee to maintain an action for the deposit against the bank.[5] A depositor in a savings bank in Pennsylvania drew an order thereon payable nine

[1] Stockton *v.* Mechanics' Bank, 5 Stew. Eq. (N. J.) 163.

[2] Makin *v.* Institution for Savings, 19 Me. 128; Makin *v.* Institution for Savings, 23 Me. 350.

[3] Sullivan *v.* Lewiston Institution for Savings, 56 Me. 507.

[4] Sullivan *v.* Lewiston Institution for Savings, 56 Me. 507. In this case the depositor received a book of deposit containing a copy of the by-laws, which, in accordance with their provisions, he thereupon "subscribed and thereby signified his assent to." These by-laws provided that "all deposits shall be entered in a book to be given the depositor, which shall be his voucher and the evidence of his property in the institution," and that "the money of any depositor may be drawn either personally or by witnessed order, in writing of the depositor, but no money shall be paid to any person without the production of the original book, that such payment may be entered therein," and that "the institution will not be responsible for loss sustained when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment." Subsequently the depositor's book was stolen, presented to and paid by the disbursing officer of the institution in good faith. In this action of the depositor to recover the deposit it was held that if the disbursing officer, using reasonable care and diligence, but lacking present means of identifying the depositor, paid *bona fide* on presentation of the book by one apparently in the lawful possession of the book, as the owner of it, the institution had a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or make known its loss before it was presented for payment.

[5] Howard *v.* Savings Bank, 40 Vt. 597.

weeks from date. Upon the upper margin of the blank form used were printed the words, "Return notice ticket with this order." On the lower margin below the drawer's signature were the following printed words: "Deposit book must be at bank before money can be paid." The Supreme Court of that state held that there was enough on the face of the order to show that, in the commercial sense, it was not a regular check and was not intended to operate as such, but was drawn on a specially deposited fund, held by the bank subject to certain rules and regulations requiring certain things to be done before payment of the order could be required. "The effect of these requirements," they said, "was to restrain or qualify the otherwise general operation of the order." The court was controlled by the settled doctrine that anything written or printed on a negotiable instrument prior to its issuance by the maker, relating to the subject-matter of the instrument and tending to restrain or qualify it, must be regarded as part of the contract intended to be evidenced thereby.[1]

§ 320. Receiving deposits by a bank knowing its insolvency.— In receiving a deposit, after his insolvency, a banker is guilty of fraud. In such case the depositor will be entitled to rescind the contract and recover the check.[2] The depositor of a check upon another bank with a bank which receives it having knowledge of its insolvency at the time, may, in an action alleging fraud, recover the check or the proceeds thereof.[3] Upon the

[1] Iron City National Bank *v.* McCord, (1891) 139 Pa. St. 52.

[2] American Trust & Sav. Bank *v.* Gueder & Paeschke Manufg. Co., (Ill. 1894) 37 N. E. Rep. 227; Chaffee *v.* Fort, 2 Lans. 81; St. Louis, etc., R. R. Co. *v.* Johnston, 133 U. S. 566.

[3] Grant *v.* Walsh, (N. Y. 1895) 40 N. E. Rep. 209. HAIGHT, J., speaking for the court, said: "The rule appears to be well settled that one who has been induced to part with his property by the fraud of another, under guise of a contract, may upon the discovery of the fraud rescind the contract and reclaim the property, unless it has come into the possession of a *bona fide* holder. In Cragie *v.* Hadley, 99 N. Y. 131; s. c., 1 N. E. Rep. 537, an action was brought by the plaintiff against the receiver of the First National Bank of Buffalo to recover the amount of a draft deposited with the bank at a time when the managers thereof knew that it was insolvent. It was held that permitting the plaintiff to make the deposit in reliance upon the supposed solvency of the bank was a gross fraud upon the plaintiff, and that the latter was entitled to reclaim the draft or its proceeds. The same rule was recognized in Bank *v.* Loyd, 90 N. Y. 530–537, but in that case there was no allegation of fraud in the answer, and consequently it was held that the evi-

discovery of the fraud practiced by a banker in receiving on deposit a check or draft, when he knows that he is insolvent, the depositor may rescind the contract, and reclaim the check or draft deposited, unless such check or draft has come into the possession of a *bona fide* holder for value.[1] If the proceeds of such a check or draft can be traced, the fund will create a trust in favor of the depositor in those proceeds.[2] Should a bank receiving from one of its customers, for deposit, his check upon another bank, knowing its own insolvency at the time, and transfer this check to another bank, in an action by the latter against the drawee of the check, if the drawee answer, by way of defense, that there was fraud practiced upon him by the receiver of the check, and show such fraud, the burden of showing that it was a *bona fide* holder of the check would be upon the bank to which the check was transferred.[3] In a South Dakota case it appeared that the plain-

dence offered, tending to show fraud, was properly excluded."

[1] National Citizens' Bank of New York *v.* Howard, (N. Y. Super. Ct. Spl. Term, 1886) 3 How. Pr. (N. S.) 511.

[2] Importers' & Traders' Bank *v.* Everett, (Sup. Ct. 1889) 21 N. Y. St. Repr. 98; s. c., 4 N. Y. Supp. 599; citing Anonymous, 67 N. Y. 598.

[3] Grant *v.* Walsh, (N. Y. 1895) 40 N. E. Rep. 209. HAIGHT, J., speaking for the Court of Appeals, said: "In Bank *v.* Diefendorf, 123 N. Y. 191–206; s. c., 25 N. E. Rep. 402, RUGER, Ch. J., in delivering the opinion of the court, says: 'The burden of making out good faith is always upon the party asserting his title as a *bona fide* holder, in a case where the proof shows that the paper has been fraudulently, feloniously or illegally obtained from its maker or owner. Such a party makes out his title by presumptions, until it is impeached by evidence showing the paper had a fraudulent inception; and when this is done the plaintiff can no longer rest upon the presumptions, but must show affirmatively his good faith.' In Vosburgh *v.* Diefendorf, 119 N. Y. 357–364; s. c., 23 N. E. Rep. 801, O'BRIEN, J., says: 'In this state it must be regarded now as a settled rule that, when a maker of negotiable paper shows that it has been obtained from him by fraud or duress, a subsequent transferee must, before entitled to recover on it, show that he is a *bona fide* purchaser.' In Bank *v.* Green, 43 N. Y. 298, it was held that a party suing upon a negotiable note purchased before maturity is presumed, in the first instance, to be a *bona fide* holder, but when the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, the plaintiff would then be required to show under what circumstances, and for what value, he became the holder. The reason of this rule, as stated by RAPALLO, J., is that 'where there is a fraud the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it.' Citing Bank *v.* Noxon, 45 N. Y. 762; Bank *v.* Carll, 55 N. Y. 440; Wilson *v.* Rocke, 58 N.

tiff had deposited with a bank, a few days before its insolvency was admitted and its doors closed, a sum of money, taking from the bank a receipt, stating the purpose for which the money was left. This purpose was, as shown by the receipt, that when a warranty deed, properly executed, conveying to him certain lands, together with an abstract showing good title in the party who was to execute this deed, was delivered to the bank by the grantor, the money was to be paid to the latter. The bank going into the hands of a receiver, the latter refused to pay the sum of money to the plaintiff upon demand. The Supreme Court affirmed the order of the court in which the proceedings in insolvency were instituted to the receiver to pay this money to the plaintiff on his petition for such order, holding that the sum of money so deposited was a trust fund, and did not become assets of the bank, nor pass to the receiver as such.[1] A depositor in a bank in Nebraska which had

Y. 642; Nickerson *v.* Ruger, 76 N. Y. 279; 2 Greenl. Ev. § 172; Bailey *v.* Bidwell, 13 Mees. & W. 73." As to fraud in receiving deposits by bankers with a knowledge of their insolvency, see Cragie *v.* Hadley, (1885) 99 N. Y. 131; Rochester Printing Co. *v.* Loomis, (1887) 45 Hun, 93.

[1] Kimmel *v.* Dickson, (S. D. 1894) 58 N. W. Rep. 561. There was presented to the court, on behalf of the receiver, an affidavit of the secretary of the bank stating that when it was left with the bank this money "was treated the same as any other deposits of said bank and mixed with the other money therein." It was not intimated that this was done with the knowledge of the one who left the money with the bank for a distinct purpose, or that he in any manner consented to it. The court said: "Upon these facts it would appear that the money was left in trust for a particular purpose. He could not, afterwards, without the acquiescence of [the one who left it] change its relation to him from that of a bailee or trustee to that of a general debtor. We apprehend that no different principle is involved because one of the parties happens to be a bank. Suppose, under the same circumstances, [plaintiff] had left the money with [the secretary] personally, and he had failed and made an assignment, would this money so found in his possession pass to his assignee as his property? If so, when and how did it become due? That he, or the bank in this case, had, without the consent of [the plaintiff] diverted the money and used it for some other purpose, ought not to affect [his] rights. Abuse of a trust can confer no rights on the party abusing it, or on those claiming privity with him. It is not claimed that [cash or money] found in the bank's vault when it failed is the very money or a part of it deposited by [plaintiff], and it is not necessary that it should be so. If the money delivered to the bank had been used by it in its business, it had presumably either paid its debts *pro tanto*, or increased its assets; and the general creditors of the bank would be in the same condition if the money found in its possession were paid over in execution of the trust as though the money deposited had been kept separate, and the identical money received had been so paid over. Peak *v.* Ellicott, 30 Kans.

become insolvent and made an assignment, claimed in the courts that, upon his allegations that the bank was insolvent at the time it received the deposit specified, within the knowledge of all of its officers, and that the officers received his money with the intention of cheating and defrauding him, he should be decreed to have a preference on account of his claim in the payment from the funds in the hands of the assignee. The Supreme Court of the state held that he did not have a right to a preference over other creditors upon the case made in his petition.[1] In a late case

156; s. c., 1 Pac. Rep. 499, was a case entirely analogous to this. Peak had left with the bank of which Ellicott, upon its failure, became assignee, money to pay a note which the bank was to send for. As in this case, he took a receipt showing the purpose for which the money was left. The bank passed the amount to the credit of Peak. After the failure of the bank, it not having paid the note, Peak brought action against the assignee, asking the same relief as is asked in this case, to wit, that the assignee be required to pay over the amount in full as a trust fund. The Supreme Court reversed the trial court, holding that the transaction constituted a trust; that the relation created was not that of a debtor and creditor, but that of principal and agent, or bailor and bailee; and that the subject of such trust did not pass to the assignee as assets of the bank. It was held, further, that the manner in which the bank had treated the fund by crediting it to Peak and mixing it with its own money did not affect his right to claim the amount from the funds on hand. Ellicott *v.* Barnes, 31 Kans. 170; s. c., 1 Pac. Rep. 767, was a similar case and the same rule controlled. McLeod *v.* Evans, 66 Wis. 401; s. c., 28 N. W. Rep. 173, 214, applies the same principles, with the same result, where a draft had been left for collection with a banker, who afterwards, and before the depositor had received its proceeds, suspended and assigned. The court held that the proceeds of the draft constituted a trust fund, which did not pass to the assignee, and there not being sufficient cash in the hands of the assignee to pay the amount, that the same should be a lien upon the assigned estate. The same principle, though to somewhat different facts, was applied in People *v.* City Bank of Rochester, 96 N. Y. 32, and again in People *v.* Bank of Dansville, 39 Hun, 187."

[1] Wilson *v.* Coburn, (1892) 35 Neb. 530. The court said: "The rule on the subject is stated by Judge STORY thus: 'The right to follow the trust fund ceases only where means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description.' Story's Eq. 1259. That the foregoing rule is applicable to cases like this, where the funds in controversy are the assets of an insolvent bank, is well settled. In Ill. Trust & Savings Bank *v.* Smith, 21 Blatchf. 275, Judge WALLACE, after remarking that the property comes into the hands of the receiver as a trust fund for the benefit of all the creditors, proceeds as follows: 'It would be a violation of law upon his part to set aside any part of their assets for the complainant unless his portion is capable of identification or being definitely traced and distin-

in the federal court for the district of Indiana, it has been held that where money and checks were unsuspectingly deposited in a bank, which was known by its managing officer to be hopelessly insolvent, a few minutes before closing time on the last day on which it did business, and the checks were subsequently collected by the bank's clerk, the whole of the deposit was charged with a trust, and an equal amount might be recovered from the receiver, who retained the specific money among the general mass of the bank's funds.[1] It was insisted in this case, on behalf of the receiver of

guished,' etc. Counsel for plaintiff in error rely with confidence upon the case of Cragie *v.* Hadley, 99 N. Y. 131. We do not, however, regard that case as authority. That was an action against the defendants for the proceeds of a draft received for collection from an insolvent bank. The fund, therefore, was easily distinguishable from the other assets of the bank. It is evident from subsequent cases in New York that that case has never been regarded as an authority in cases like this, where the money of the claimant has been mingled with the other funds of the bank, and cannot be distinguished from other assets in the hands of the assignee or receiver. In re N. River Bank, 14 N. Y. Supp. 261, is a case directly in point. The Supreme Court therein, after showing that Cragie *v.* Hadley was not authority, for the reason given above, hold that the petitioner was not entitled to preference, although he deposited his money on the forenoon of the day on which the bank closed its doors, on the assurance that it was solvent, upon the ground that it did not appear that the money had not gone into the general funds of the bank, and because he had failed to impress upon the funds in the hands of the receiver the character of a trust. In Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, the same distinction is made, and the court says: 'The fact that the defendant became a creditor of the insolvent bank through the fraud of its officers, and the bank, a trustee *ex maleficio*, gave the defendant no right to a preference over other creditors unless it could trace and recover its property.' And such is the law as recognized from the earliest history by the courts of chancery. Ryall *v.* Rolle, 1 Atkyns, 172; Thompson's Appeal, 22 Pa. St. 16; Perry on Trusts, § 128."

[1] Wasson *v.* Hawkins, (1894) 59 Fed. Rep. 233. *Arguendo*, it was said by BAKER, D. J. · "The bank was insolvent, and was known by its president, who had sole management of it, to be insolvent. The knowledge of the president was the knowledge of the bank. Martin *v.* Webb, 110 U. S. 7; s. c., 3 Sup. Ct. Rep. 428; Bank *v.* Walker, 130 U. S. 267; s. c., 9 Sup. Ct. Rep. 519. It fraudulently concealed its insolvency from the complainant, who was ignorant of it, and, believing it to be solvent, he deposited in the bank bank notes and checks to [a certain] amount within five minutes of its final collapse. The reception of the money and checks, under such circumstances, was a fraud upon the plaintiff, and entitled him to rescind the transaction, and recover back his deposit from the bank. The keeping of the bank open, and the conducting of its business in the usual manner, constituted a representation to its customers of the solvency of the bank, upon which they had the right to rely;

the bank, that, though the money and checks were obtained by fraud, the title to them vested in the bank; and that the only relation subsisting between the plaintiff depositor and the bank was that of creditor and debtor; and that he could not reclaim the money and checks, because money has no mark and cannot be identified; and that the plaintiff had no lien on the funds in the receiver's hands entitling him to priority or preference over the other creditors of the bank. The court held adversely to this contention; that the depositor was entitled to be preferred out of the funds in the hands of the receiver.[1]

and if the bank was known to be insolvent by the officers who were charged with its management, the concealment of that fact from a person about to make a deposit would constitute a fraud upon him. The title acquired by the bank to the money and checks deposited under such circumstances would be voidable at the election of the depositor, who could bring suit to recover his deposit, without any previous demand. The bank would become a trustee *ex maleficio*, and would hold the deposit for the use of the depositor, and subject to his right of reclamation. Railway Co. *v.* Johnston, 133 U. S. 566; s. c., 10 Sup. Ct. Rep. 390; Cragie *v.* Hadley, 99 N. Y. Rep. 131; s. c., 1 N. E. Rep. 537; City of Somerville *v.* Beal, 49 Fed. Rep. 790; Peck *v.* Bank, 43 Fed. Rep. 357. In the case of Cragie *v.* Hadley, *supra*, it was held that the acceptance of the deposit by a bank hopelessly insolvent constituted such a fraud as entitled the depositor to his drafts or their proceeds. In Anonymous Case, 67 N. Y. 598, the court say: 'This is not like the case of a trader who has become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. Nichols *v.* Pinner, 18 N. Y. 295; Brown *v.* Montgomery, 20 N. Y. 287; Johnson *v.* Monell, 2 Keyes, 655; Chaffee *v.* Fort, 2 Lans. 81. But it is believed that no case can be found in the books holding that a trader who was hopelessly insolvent and knew that he could not pay his debts, and that he must fail in business, and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity, and thus obtain property which he had every reason to believe he could never pay for.' And it was decided that 'in the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders;' and that 'a banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and, although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, *i. e.*, to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business.'"

[1] Wasson *v.* Hawkins, (1894) 59 Fed. Rep. 233. The discussion by the court of the question thus raised deals very

§ 321. Certificates of deposit.—In making the discount of a note, a bank may give a certificate of deposit for the proceeds, instead of paying over the money to the borrower.[1] Where one person intrusts money to another to deposit in bank, the bank having knowledge of the ownership, but no discretion as to the

fully with English as well as other authorities, and was in these words: "It was said by Lord KING in Deg *v.* Deg, 2 P. Wms. 414, 'that money had no earmark, inasmuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator's estate, and afterwards die insolvent, yet, a court of equity could not charge or follow the land.'" See, also, Cox *v.* Bateman, 2 Ves. Sr. 19. And bank notes and negotiable bills have been represented as possessing the same quality. But the notion that money, because it had no earmark, could not be followed into or charged upon land in the hands of the trustee or his executor, arose from some misconception, and could not be supported. In Miller *v.* Race, 1 Burrows, *452, Lord MANSFIELD exposed this misconception, and pointed out the true reason why money could only be pursued under particular circumstances. He observed: "It has been quaintly said that the reason why money cannot be followed is because it has no earmark; but this is not true. The true reason is upon the currency of it; it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but, before money has passed in currency, an action may be brought for the money itself. Apply this to the case of a bank note. An action may lie against the finder, it is true, and it is not at all denied, but not after it has been paid away in currency; and this point has been determined even in the infancy of bank notes." Lord ELLENBOROUGH, in Taylor *v.* Plumer, 3 Maule & S. 562, 575, observed: "The dictum that money has no earmark must be understood as predicated only on an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished are so far earmarked as to fall within the rule which applies to every other description of personal property while it remains in the hands of the factor or his general legal representative." After these references to English cases, it was said: "The true distinction, therefore, between money, bank notes or negotiable bills, and other chattels, would seem to be that the former, for the protection of commerce, cannot be followed into the hands of a *bona fide* holder to whom they have passed in due course of business, while other chattels affected by a trust may, in general, be pursued and reclaimed. The ancient notion that money could not be followed, even as between trustee and *cestui que trust*, because money had no earmark, has given way to a more just and enlightened doctrine. Money, bank notes and negotiable bills may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they have passed has express notice of the trust. Miller *v.* Race, 1 Burrows, *452; 1 Smith Lead.

[1] Mississippi Railroad Co. *v.* Scott, 7 How. (Miss.) 79.

manner of making the deposit, it will be warranted in receiving the money and giving a certificate of deposit therefor in the name of the person presenting the money for deposit. And where the real owner of the money deposited, receiving notice of the manner in which it was deposited, fails to dissent thereto within a

Cas. (5th Amer. ed.) 597 (*250); Taylor *v.* Plumer, 3 Maule & S. 562, 575; King *v.* Egginton, 1 Term R. 370; Ryall *v.* Rolle, 1 Atk. 172; Pennell *v.* Deffell, 4 DeGex, M. & G. 372; In re Hallett's Estate, 36 Eng. R. 779; s. c., 13 Ch. Div. 696; National Bank *v.* Insurance Co., 104 U. S. 54. The only difference between money and notes and bills, is that money is not earmarked, and, therefore, cannot be traced, except under particular circumstances, while bills and notes, having a number and date, may generally be identified with less difficulty. It is conceded that, if plaintiff could identify the particular coins and bank notes which he had deposited, he would have the right to withdraw them from the mass of coins and bank notes which passed into the hands of the receiver; but it is insisted that inasmuch as the money deposited by him has, like water, flowed into the common mass and so become incapable of identification, the right to pursue and reclaim it is lost, although it is admitted that the very coins and bank notes deposited by him constitute a part of the common mass. It is charged in the bill, and admitted by the demurrer, that the identical coins and bank notes deposited by the plaintiff remained in the bank when it stopped business, and came into the hands of the receiver, who now has them in his possession as a part of the general mass of coins and notes held by him as such receiver. In such a case the identification is sufficient to entitle the depositor to follow and reclaim the deposit made by him. Although the identical coins and bank notes cannot be ascertained, yet, as it is admitted that so much in coins and bank notes belonging to the plaintiff is in common mass, he is entitled, in equity and good conscience, to take so much out. If he does not withdraw from the common mass the very coins and bank notes deposited by himself, no injustice is done, for he leaves an equitable amount of his own in place of every coin or bank note deposited by another. Pennell *v.* Deffell, 4 DeGex, M. & G. 372; In re Hallett's Estate, 36 Eng. R. 779; s. c., 13 Ch. Div. 696; Cragie *v.* Hadley, 99 N. Y. 131; s. c., 1 N. E. Rep. 537; National Bank *v.* Insurance Co., 104 U. S. 54; Frelinghuysen *v.* Nugent, 36 Fed. Rep. 229; Peters *v.* Bain, 133 U. S. 670; s. c., 10 Sup. Ct. Rep. 354; Bank *v.* Dowd, 38 Fed. Rep. 172; Atkinson *v.* Printing Co., 114 N. Y. 168; s. c., 21 N. E. Rep. 178; In re North River Bank, 14 N. Y. Supp. 261. And the proceeds of the checks are governed by the same principle, because the identical coins and bank notes realized from their collection constitute a part of the common mass in the receiver's hands. The mere fact that the plaintiff became a creditor of the insolvent bank through the fraud of its president, and that the bank became a trustee *ex maleficio,* would give him no right to preference over other creditors, unless he can trace and identify his money as a part of the common mass. But when it is shown by indubitable proofs, or is admitted, as in the present case, that the identical bank notes and coins so obtained by fraud, constitute a part of the common mass of bank notes and coins

reasonable time, he will be held to have ratified the same. And after the lapse of several years he cannot object that the bank subsequently paid over the money to his agent upon the presentation of the certificate of deposit, the bank having no knowledge that the agent's possession of the certificate was wrongful and tortious.[1] A certificate of deposit is *prima facie* evidence of indebtedness.[2] A certificate of deposit payable in "currency" means *prima facie* money current by law, or paper equivalent in value circulating in the business community at par.[3] By giving a certificate of deposit for current bank notes," the receiver of the deposit admits that to be the character of the money received, and will be estopped by the admission from showing that the funds received were not current, or claiming the right to pay in anything but the same character of funds.[4] A certificate of deposit has been treated, in fact and in law, as a promissory note for the payment of money.[5] A certificate of deposit for a stated sum, to draw interest, if left for thirty days, and payable on return of the certificate properly indorsed, has

in the hands of the receiver, in my judgment, the modern and better doctrine is that the depositor may take out of the common mass so much as he has put in."

[1] Bank of Montreal *v.* Dewar, (1880) 6 Bradw. (Ill.) 294. On the first point the court cited McNeil *v.* Tenth National Bank, 46 N. Y. 325; Anderson *v.* Armstead, 69 Ill. 452.

[2] Cushman *v.* Illinois Starch Co., 79 Ill. 281.

[3] Phelps *v.* Town, 14 Mich. 374. In Hulbert *v.* Carver, (1863) 40 Barb. 265, where the plaintiffs had deposited money with defendants, bankers in Chicago, Illinois, taking a certificate that they had deposited in the bankers' office a certain amount "Illinois currency," payable to the order of themselves on return of the certificate, the Supreme Court of New York held that they were at least entitled to payment in Illinois currency, receivable in the ordinary transactions of business at par, if not entitled to specie.

[4] Osgood *v.* McConnell, (1863) 32 Ill. 74. As to the meaning of "currency" and "current bank bills" the court said: "This court has repeatedly held that currency and current bank bills have a fixed known signification. That the term currency means bank bills or other paper money, which passes as a circulating medium in the business community as and for the constitutional coin of the country. Current bank bills, it will be perceived, mean precisely the same thing as currency. This question has been repeatedly before the court, and it has been uniformly so held. See Chicago Fire & Marine Ins. Co. *v.* Keiron, 27 Ill. 501; Marine Bank *v.* Chandler, 27 Ill. 525; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332; Chicago Marine & Fire Ins. Co. *v.* Carpenter, 28 Ill. 360; Marine Bank *v.* Rushmore, 28 Ill. 463; Swift *v.* Whitney, 20 Ill. 144; Trowbridge *v.* Seaman, 21 Ill. 101."

[5] Bank of Peru *v.* Farnsworth, 18 Ill. 563; Laughlin *v.* Marshall, 19 Ill. 390.

been held to be a good promissory note.[1] Where a bank addresses to another bank an instrument stating that a person had deposited with it a stated sum of money to the credit of the latter bank for the use of a third person, such instrument would be in its legal character a certificate of deposit.[2] A certificate of deposit, "payable in current funds," is equivalent to a promissory note, but not being payable in money is not governed by law merchant.[3] Indorsees of a certificate of deposit, not bearing interest, who received it more than six years after it had been paid and should have been surrendered, were held by the Indiana Supreme Court to have taken it as dishonored paper, and not as a continuing negotiable security, and not entitled to enforce its second payment after such an unreasonable delay.[4] The transferree by indorsement of a certificate of deposit, takes it subject to all equities between the payee and the bank.[5] In a case where a national bank upon a deposit made by a depositor over its counter, in the usual course of business, issued to him a certificate of deposit, which he received in the belief that it was the obligation of the bank, but which purported to be the individual obligation of its president, the officers of the bank knowing of and permitting this course of business, the Supreme Court of New York held that the defendant was not bound by the acceptance of the certificate to knowledge or notice that the deposit was accepted by the president of the bank individually, but was entitled, under the circumstances, to believe the certificate was the obligation of the bank, and that the bank was estopped to deny its liability on the certificate.[6] A bank has been held responsible for the money of a depositor notwithstanding a fraud perpetrated by its officers in inducing the depositor to accept their certificate of deposit as that of the bank.[7] But a bank would not be responsible for an

[1] Howe *v.* Hartness, (1860) 11 Ohio St. 449.

[2] Armstrong *v.* American Exchange National Bank, 133 U. S. 433.

[3] National State Bank of La Fayette *v.* Ringel, (1875) 51 Ind. 393.

[4] Gregg *v.* Union County National Bank, (1882) 87 Ind. 238. As to the regularity of certificates of deposit, see O'Neill *v.* Bradford, 1 Pinn. (Wis.) 390; Ford *v.* Mitchell, 15 Wis. 304; Platt *v.* Sauk County Bank, 17 Wis. 222; Lindsey *v.* McClelland, 18 Wis. 481; Klauber *v.* Biggerstaff, 47 Wis. 551.

[5] Humboldt Trust Co.'s Estate, 3 Pa. Co. Ct. Rep. 621.

[6] West *v.* First National Bank of Elmira, (1880) 20 Hun, 408. As to negotiability of a certificate of deposit, see Smith *v.* Mosby, Receiver, (1872) 9 Heisk. (Tenn.) 501.

[7] Steckel *v.* Bank, 93 Pa. St. 376; Ziegler *v.* Bank, 93 Pa. St. 393.

interest-bearing certificate of deposit, issued by its president in the name of his firm, under circumstances by which the depositor could not have been misled.[1] In an Illinois case it appeared that the employee of owner of money, who had intrusted it to him to deposit for him in a bank, deposited it in his own name, the bank knowing whose money it was at the time. The employee afterward indorsed the certificate of deposit to the owner of the money, who deposited the certificate in the safe to which his employer had access, but gave no notice of these facts to the bank until after the employer had taken the certificate, and drawn the money on it, and had it placed to his own individual account, when he did inform the bank of his rights. After this, however, he treated the transaction as a loan to his employee for over three years, expecting to have him secure it. During this time he made no claim on the bank. The Supreme Court held that under these facts the owner of the money thus deposited could not maintain an action of trover against the bank for a conversion of the money, for the reason that he had by his acts vested his employee with an apparent ownership or control of the money, and had thus acquiesced in the payment of the money to him.[2] The assigning of a certificate of deposit transfers to the assignee the whole sum deposited, as stated in the certificate.[3] An innocent holder of a certificate of deposit issued to a cashier, naming him, for funds deposited belonging to his bank which the cashier transferred to him, would be protected, though the transfer may be in bad faith on the part of the cashier.[4] An attempt by the holder of a certificate of deposit to obtain payment of it before

[1] Bank *v.* Williams, 11 W. N. C. (Pa.) 347. In Jenkins *v.* Walter, 8 G. & J. (Md.) 218, a guardian had deposited money of his ward in a bank and received a certificate of deposit payable to his own order. On the day of deposit, by an indorsement on the certificate made to himself, he declared it to be the property of his ward, and placed in bank for his benefit. The depositor subsequently failed. The court held that the bank might apply the fund in satisfaction of any claim it had against the depositor.

[2] Dewar *v.* Bank of Montreal, 115 Ill. 22.

[3] Springfield Marine & Fire Ins. Co. *v.* Peck, (1882) 102 Ill. 265. In Hazleton *v.* Bank of Columbus, 32 Wis. 34, a bank which had paid its certificate of deposit to one to whom it had been properly indorsed, though without consideration as to one who really owned it and the money, and the indorsement was forged, it was held, would not be liable on the certificate to the original payee.

[4] Perpetual Ins. Co. *v.* Cohen, (1845) 9 Mo. 421. In Philipps *v.* Franciscus, (1873) 52 Mo. 370, where one owing money to another took the amount, and, after placing it in an en-

it falls due, is not inconsistent with its ownership by some one else.[1] The *bona fide* holder of a certificate of deposit issued by a bank payable on its return, properly indorsed, to whom it was transferred seven years after its issue, has been held entitled to recover the amount from the bank, notwithstanding the bank had paid it to the original holder.[2] The holder of a non-negotiable certificate of deposit, which has been indorsed to him in blank by the payee and delivered to him, may make a valid pledge of it to an innocent party, without reference to the equities between himself and the payee.[3] On demand of payment of a certificate of deposit in a savings institution payable to the depositor or order, on demand and on return thereof, the bank has the right to insist that the certificate shall be produced and delivered up as its voucher of payment, and security against any future claim.[4] In a Vermont case it appeared that an insolvent person fraudulently procured a certification of a check from a bank, which he deposited in a second bank to the credit of a third bank for the use of one to whom he was indebted to that amount. The creditor of the insolvent had previously directed the latter to deposit that sum for him in bank, but had no communication with the second bank, above referred to, on the subject. The bank, on receiving the deposit, had addressed a letter to the third bank, informing them of the deposit and credit, but, before this bank received the letter, notified them by telegraph by procurement of the bank certifying the check, not to make payment to the creditor upon this credit, as there was something wrong. The creditor was also

velope, sealed the package and placed it in the hands of a banker and took a certificate of deposit of the same, which he indorsed and delivered to his creditor, the title of the latter to the money was held to be complete. In Second National Bank of Baltimore *v.* Wrightson, Exr., (1884) 63 Md. 81, it appeared that the appellee's testator had deposited a sum of money in the bank and received a certificate of deposit stating that the same was payable to the order of himself or of his wife (naming her) on the return of the certificate. The Court of Appeals held that upon the death of the depositor a payment of the certificate to the wife was not authorized, but that the bank was entitled to a credit for the amount which she had drawn and applied to the use of his estate in the way of personal expenses, etc. Citing Murray *v.* Cannon, Admr., 41 Md. 466; Taylor *v.* Henry & Bruscup, Admrs., 48 Md. 550.

[1] Burrows *v.* Bangs, 34 Mich. 304.

[2] National Bank of Fort Edward *v.* Washington County National Bank, (1875) 5 Hun, 605.

[3] International Bank *v.* German Bank, (1879) 71 Mo. 183.

[4] Fells Point Savings Inst. of Baltimore *v.* Weedon, Admr., 18 Md. 320.

informed by telegraph by his debtor, the insolvent, the drawer of the check, that payment of the credit had been stopped. These telegrams were received as early at least as the creditor received notice of the deposit, and before he had in any way acted upon it. The certifying bank, before becoming fully informed of the fraud, had paid the money on the check to the second bank. On the bill in chancery brought by the certifying bank, the Supreme Court held that it was entitled to reclaim the money from the bank to which it had paid it; that the receipt of the money by that bank was not in law a payment to the creditor, considering the relations between all the parties growing out of this transaction.[1] The right of action upon an ordinary certificate of deposit does not arise until a demand for payment is made.[2] Limitations on a certificate of deposit payable with interest on demand and on return of same, run along from the time of demand actually made.[3] The defendant in this New York case, a director of a national bank, had deposited a certain amount of money in the bank, and received three certificates of deposit, two at one time and one at another, bearing six per cent interest. The two certificates first issued, the cashier, in a little more than three years after their issue, voluntarily paid by a transfer of negotiable paper belonging to the bank, and the payment of a small cash difference, giving as a reason therefor "that his directors did not like his paying so large a rate of interest;" the payment was not requested by the depositor. Near nine months later the third certificate, which had been indorsed and transferred by the depositor to another national bank, was paid to the bank in the settlement of exchanges between the banks in the usual manner. At the time of the payment the bank was insolvent, and had been so for some years, its insolvency being known only to the cashier, and it was in good credit with the public,

[1] Bank of Republic *v.* Baxter, 31 Vt. 101. In Cate *v.* Patterson, 25 Mich. 191, the payee of a certificate of deposit had transferred it with a special request that it should not be presented until three months had expired, and had actually received from the purchaser the interest accrued at the date of the transfer. The purchaser presented the certificate after the time expired and the bank had in the meanwhile failed. In an action against the payee as indorser, he was held not to have been relieved from liability on the ground that the presentment for payment was not in due time.

[2] Munger *v.* Albany City National Bank, (1881) 85 N. Y. 580.

[3] Fells Point Savings Inst. of Baltimore *v.* Weedon, Admr., etc., 18 Md. 320.

doing business without suspicion. Its financial condition shortly after the payment of the third certificate of deposit became public from the absconding of the cashier and one of the bookkeepers. The receiver of the bank, afterwards appointed, brought this action against the former depositor to recover the amount of the deposits paid him, upon the ground that the payments were void under the section of United States Revised Statutes cited below,[1] which provides as follows: "All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." The New York Court of Appeals affirmed the dismissal of this action upon the findings of fact and evidence by the trial court, which had also been affirmed by the General Term.[2] In a case it appeared

[1] § 5242.

[2] Hayes *v.* Beardsley, (1892) 136 N. Y. 299. EARL, Ch. J., in the opinion, said: "The bank had not committed any act of insolvency, as it met all its obligations as they became due or were demanded during more than six weeks after the last certificate was paid. While its cashier knew that the bank was insolvent, and must have expected that it would ultimately fail to meet its obligations and be obliged to go into liquidation, yet it cannot be said to have been an undisputed fact in the case that the financial collapse of the bank was impending or imminent, and there is little if any ground for saying that these payments were made in contemplation of insolvency. The cashier paid the certificates, as he did all other demands upon the bank as they were from time to time presented by its numerous customers. The first two certificates were paid, as we must assume, for the reason assigned by the cashier at the time, because they were bearing interest at a larger rate than the directors of the bank were willing longer to pay, and the last certificate was paid to the [bank holding it] in the ordinary course of business in the settlement of exchanges between the two banks. There was no satisfactory evidence that these payments were made by the bank to prevent the application of its assets in the manner prescribed in the National Banking Act or with a view to a preference of the defendant over the other creditors of the bank. The circumstances under which the payments were made and the condition and credit of the bank at the time forbid the inference that the payments

that two persons who were directors both of a savings bank and of a national bank, procured money from the savings bank on two notes made by third persons to them, and given for the payment of stock of the national bank, issued in the names of the third persons for their benefit. These persons represented to the savings bank that it would have to carry the notes but a short time, and that the national bank would take care of them. They were behind in their account with the national bank, and the savings bank allowed them to overdraw their accounts with it to a large amount, which money was used in settling their accounts with the national bank. After this the savings bank delivered the notes and the check representing the overdrafts to the national bank, and received from the latter a certificate of deposit for an amount covering the whole amount represented by the notes and check. In a suit by the receiver of the savings bank, which had become insolvent, against the receiver of the national bank,

were made for such a purpose. The defendant was not selected as a favorite creditor. During all the years of the insolvency of the bank all creditors were treated alike, and there was no preference of one over another. All its demands were met at maturity. There does not appear from the facts found to be any better ground for claiming that these payments made to the defendant were void than there is for making the same claim in reference to the numerous payments made in the regular course of business by this bank to its customers during many months prior to the closing of its doors. In order to uphold a recovery in an action like this there should be some satisfactory evidence that the cashier or other officer actually paid the money of the bank in contemplation of insolvency for the purpose of giving a preference to the payee and with a view to prevent the application of the assets of the bank to the creditors generally, as provided in the National Banking Act. We think all the circumstances surrounding these deposits and payments forbid such an inference." As to the effect of the defendant being a director it was said: "The insolvency of this bank seems to have been covered up and concealed by the cashier with great skill and ingenuity. It was not discovered by the bank examiners in making their examinations of the bank, and no one of the directors had the least suspicion of it. The fact that the defendant, entirely ignorant of the insolvency of the bank, was a director does not, under such circumstances, as a matter of law, charge him with liability for the payment made to him. In the trial of the case and in weighing and balancing the evidence that fact might have weight — in some cases controlling weight — with the trial court. But when, after all the evidence is given, it is found that the director acted in good faith, was ignorant of any wrongdoing or of the insolvency of the bank, then a payment made to him must be tested under section 5242 [U. S. Rev. St.] like payments made to any other creditor of the bank."

also insolvent, based upon this certificate of deposit, it was held that the certificate of deposit was without consideration and void, and that the savings bank would have to submit to the loss accruing to it out of the transaction, as the loss was due to the fraud or incompetency of its own officers.[1]

§ 322. **Special deposits.**—The United States Supreme Court has held that the provision of the National Banking Association Act, that it shall be lawful for a national bank after its failure to "deliver special deposits," was as effectual a recognition of the power of a national bank to receive special deposits as an express declaration to that effect would have been.[2] Bank notes, when received by a bank on general deposit, become the property of the bank, and the amount a debt payable on demand by the bank to the person entitled to it. An action of debt or assumpsit against the bank is the only remedy of the creditor in case payment be refused. But it is different if they be deposited as a special deposit. The deposit then is nothing but a bailment. And if a cashier of the bank converts them it is a tortious act for which he will be held individually liable in an action of trover.[3] A deposit in bank will not be made a special one nor will the liability of the bank be changed by the addition of the word "clerk" to the name of a general depositor.[4] Where a bank has given a receipt for money received "on deposit," such a receipt would not show whether it was a special or general deposit, and the bank would be allowed to show by parol evidence that the transaction was in fact a special deposit.[5] In cases of special deposit the right of property remains in the depositor, and he is entitled to receive back the identical thing deposited.[6] A bank, in receiving a special deposit, undertakes to exercise no greater care in its preservation than the depositor has the reasonable right

[1] Murray *v.* Pauly, (1893) 56 Fed. Rep. 962.

[2] National Bank *v.* Graham, (1879) 100 U. S. 699, which overruled Whitney *v.* National Bank of Brattleboro, 50 Vt. 388.

[3] Coffin *v.* Anderson, (1837) 4 Blackf. (Ind.) 395.

[4] McLain *v.* Wallace, (1885) 103 Ind. 562. Distinction between special and general deposits, McLain *v.* Wallace, (1885) 103 Ind. 562; Keene *v.* Collier, 1 Metc. (Ky.) 417. As to a special deposit of bonds, see Van Leuven *v.* First National Bank of Kingston, (1873) 54 N. Y. 671.

[5] Keen *v.* Beekman, 66 Iowa, 672.

[6] Lowry *v.* Polk County, 51 Iowa, 50. As to a bank's liability to return a special deposit in kind, see Chesapeake Bank *v.* Swain, 29 Md. 483.

to suppose is exercised in caring for its own property of like description.[1] A bank, receiving a package of money as a special deposit without compensation, will be bound only for slight care, and responsible only for gross negligence.[2] The obligation of a banker in the keeping of a deposit will not be increased by a mere showing to the depositor the facilities and securities of the bank.[3] A bank will be liable where special deposits are lost by reason of gross negligence or willful inattention on the part of its directors.[4] In case a special deposit of bonds, stock or coin with a bank be stolen or embezzled by its clerk or cashier and he does not participate in the act and is guilty of no negligence in the matter, the bank will not be responsible to the depositor for its value.[5] A national bank will be held liable for damages occasioned by the loss, through negligence, of a special deposit made in it with the knowledge and acquiescence of its officers and directors.[6] Rcbbery by burglars of securities deposited for safe-keeping in the vaults of a bank would be no proof of negligence on the part of the bank in caring for the property.[7] In a Vermont case, one depositing with the cashier of a national bank $4,000 of United States bonds, received this writing: "Received of J. D. Whitney four thousand dollars for safe-keeping as a special deposit." [Signed] "S. M. Waite, C." This appearing to be a naked deposit without reward, the Supreme Court of that state held that the word "safe-keeping" only indicated the purpose for which the bonds were delivered and received, and did not import a contract to keep safely; that the bank was answerable only for fraud or gross negligence in the keeping of the bonds, and was not liable for the

[1] United Society of Shakers *v.* Underwood, (1873) 9 Bush (Ky.), 616.

[2] Hale *v.* Rawallie, (1871) 8 Kans. 136.

[3] Ibid. An illustration of a bank being rendered liable to a depositor as trustee for a breach of trust in connection with its application of the avails of a special deposit for the benefit of depositor's agent, Manhattan Bank *v.* Walker, 130 U. S. 267. In Leach *v.* Hale, 31 Iowa, 69, United States bonds were deposited with a bank for the purpose of their being converted into similar bonds of another denomination. The Supreme Court held that the transaction should be deemed one for a compensation and not a gratuitous one, and that the bank was liable as a bailee for hire.

[4] United Society of Shakers *v.* Underwood, (1873) 9 Bush, 616. As to the care with which a bank must keep a special deposit, see Boyden *v.* Bank of Cape Fear, 65 N. C. 13.

[5] Sturges *v.* Keith, (1870) 57 Ill. 451.

[6] National Bank *v.* Graham, (1879) 100 U. S. 699.

[7] Wylie *v.* Northampton Bank, 119 U. S. 361.

loss by robbery or larceny, if the bank acted in good faith and took the same care of these bonds as it did of its own of like character.[1] By a cashier wrongfully transferring a special deposit and putting it with the funds of the bank, and the bank reporting and treating it as a part of its assets, a conversion of the deposit is effected, and no demand and refusal would be necessary for the depositor to maintain an action of trover against the bank.[2] Where a bank receiving a special deposit had transferred it to another bank established at the same place, with the same officers, and the deposit was embezzled by the cashier, the Kentucky Court of Appeals held that the bank receiving the deposit would be liable unless the depositor directly or by implication assented to or ratified the transfer prior to the loss.[3]

§ 323. **The duty of a bank as to deposits and its right as to their application.**— A deposit received under special agreement must be applied by the bank according to the agreement.[4] A depositor with a bank who, having made overdrafts, should transfer securities to the bank, and request that these overdrafts be paid, would thereby create a valid trust for the payment of such outstanding checks and drafts, whether presented or not, and the holders of such checks and drafts would be entitled to payment out of the securities so deposited in preference to the general creditors of the depositor.[5] Where a depositor of a bank

[1] Whitney *v.* National Bank of Brattleboro, 55 Vt. 154. As to the liability of a bank receiving special deposits where loss is the result of their gross negligence, see Foster *v.* Essex Bank, 17 Mass. 479; Lancaster County National Bank *v.* Smith, 62 Pa. St. 47; Scott *v.* National Bank of Chester Valley, 72 Pa. St. 471; First National Bank of Carlisle *v.* Graham, 79 Pa. St. 106; Turner *v.* First National Bank of Keokuk, 26 Iowa, 562; Smith *v.* First National Bank in Westfield, 99 Mass. 605; Chattahoochee National Bank *v.* Schley, 58 Ga. 369.

[2] First National Bank of Monmouth *v.* Dunbar, 19 Bradw. (Ill.) 558.

[3] Ray *v.* Bank of Kentucky, (1874) 10 Bush (Ky.), 350. That a bank is not liable in case its cashier fraudulently takes away a special deposit made in the bank, see Foster *v.* Essex Bank, (1821) 17 Mass. 479; Smith *v.* Westfield Bank, (1868) 99 Mass. 605.

[4] Wilson *v.* Dawson, (1876) 52 Ind. 513, in which case the surety of a depositor for debts due at the bank, where the depositor had deposited more than sufficient to pay those debts, but under special agreement that these deposits were to be paid out on checks for certain purposes, some of which deposits was in bank when the debts matured, and paid out under the agreement, was held not released, though ignorant of the special agreement with the depositor.

[5] Watts *v.* Shipman, (1880) 21 Hun, 598.

is indebted to the bank by bill, note or other independent indebtedness, the bank has the right to apply so much of the funds of the depositor to the payment of his matured indebtedness as may be necessary to satisfy the same.[1] And the same rule obtains where a depositor makes his paper to third persons payable at the bank. As it is the duty of the bank to pay its customers' checks, when in funds, so at least it has authority, if it is not under actual obligation, to pay his notes and acceptances made payable at the bank. It is a presumption of law that if a customer does so make payable or negotiable at a bank any of his paper, it is his intent to have the same discharged by his deposit.[2] The Supreme Court of Illinois has held that the order of a depositor to his bank to apply his funds deposited to the payment of a note of his payable at the bank is necessary to give the bank power to pay the note.[3] Verbal direction, or a check or draft or some other writing signed by a depositor to a bank in which he has deposits, is necessary to justify a payment by the bank out of his funds of a draft which the depositor has accepted made payable at such bank.[4] A bank may apply all the funds of a

[1] Home National Bank *v.* Newton, (1881) 8 Bradw. (Ill.) 563; citing Morse on Banks & Banking (2d ed.), 42; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94.

[2] Home National Bank *v.* Newton, (1881) 8 Bradw. (Ill.) 563; citing Morse on Banks & Banking, 37. The Illinois Appellate Court in Home National Bank *v.* Newton, *supra,* further said: "The neglect of the bank to make such appropriation would discharge the indorsers and sureties. McDowell *v.* Bank of Wilmington, 1 Harrington (Del.), 369; Dawson *v.* Real Estate Bank, 5 Pike (Ark.), 283. The act of thus making his paper payable at a bank is considered as much his order to pay as would be his check, and, if the bank pay without express orders to the contrary, it is a defense to a suit by the depositor for the money so paid. Mandeville *v.* Union Bank of Georgetown, 9 Cranch, 9. And the rule seems to be settled that if a bank advances the money to pay a note or bill of its customer made payable at the bank, it may recover from the depositor as for money loaned, the paper so made payable being deemed equivalent to a request to pay. He makes the bank his agent with implied authority to protect his credit by appropriating his deposits to the payment of his maturing obligations made payable at the bank. Forster *v.* Clements, 2 Camp. 17; Mandeville *v.* Union Bank of Georgetown, 9 Cranch, 9. These general principles are sufficient to show the relation which exists between a bank and its depositors in respect to the paper of the latter made payable by its terms at the bank, and they make the bank the agent, not of the payee of such paper, but of the maker."

[3] Ridgely National Bank *v.* Patton, 109 Ill. 479.

[4] Haines *v.* McFerren, 19 Bradw. (Ill.) 172. As to the lack of power of

depositor which it has to his credit to an indebtedness created by the payment upon a discount by the bank upon him until it is fully discharged.[1] The full balance due a general depositor may be tendered to him at any time by the bank holding it, but he cannot be compelled by the bank to receive less.[2] A bank cannot set off an individual deposit against a partnership debt to the bank.[3] Where money is deposited in a bank in the name of a firm, and the bank pay a check out of the same drawn by one of the firm in his own name only, to justify such payment the bank would be required to show that the money thus drawn on the firm account was applied to the use of the firm.[4] It would be no excuse for a bank, in paying out funds deposited in the name of a firm upon the individual check of a member of that firm, that the partner drawing the check told the officer of the bank that it was drawn on the joint account and in his individual name by mistake, and directed him to pay it and any other of the like kind which he might draw out of the firm's funds.[5] In an Indiana case money in the form of a draft was sent by A. to a bank, with directions to place it to his credit and await his further orders. The banking firm gave a receipt for it. Afterward A. agreed with B. that the draft should be transferred to B.'s credit, but the banking firm was not privy to the agreement, nor did A. notify them of it. B., without authority from A., wrote to the firm, ordering them to place the draft to his credit, and they replied that they had done so. In the suit brought by A. against the bankers after payment of the same was refused by them upon his demand, the Supreme Court held that the bankers were liable to A. for the amount of the draft.[6] A bank is under no obligation to pay checks of its depositors in excess of their deposits, unless there be a special arrangement to that effect.[7] A bank

a bank to transfer money deposited with it to the payment of notes executed by the depositor, payable at the bank, unless depositor consent, see Scott *v.* Shirk, (1877) 60 Ind. 160. As to its not being bound to pay such money on a note held by a third party upon oral request of the depositor when not proposed to surrender the note to the banker or give any other evidence of payment, see McEwen *v.* Davis, (1872) 39 Ind. 109.

[1] Union Bank of Quincy *v.* Tutt, (1878) 5 Mo. App. 342.

[2] Coots *v.* McConnell, 39 Mich. 742.

[3] International Bank *v.* Jones, 119 Ill. 407.

[4] Coote & Jones *v.* Bank of U. S., 3 Cranch Cir. Ct. 50.

[5] Ibid.

[6] Coffin *v.* Henshaw, (1858) 10 Ind. 277.

[7] Decatur National Bank *v.* Murphy, (1881) 9 Bradw. (Ill.) 112.

may maintain an action against the drawer for payment made by its cashier on checks overdrawn.[1] Should a depositor fraudulently overdraw his account, and the identical money is placed by him to his credit in another bank, the bank from which it was drawn may reclaim it from the one in which he has placed it.[2] After receiving from a depositor a genuine check drawn upon it by another depositor, and crediting the amount to the one depositing it, even on the deposit ticket alone, through its receiving teller, a bank cannot return it to the depositor as not good, although the drawer's account may have been overdrawn at the time the check was deposited.[3] A bank receiving a deposit under an agreement to apply it to the payment of a debt due some designated person, cannot divert it from the purposes of the trust by paying it to a different person.[4] Should one to whom a bank has by mistake paid the money of one of its depositors, make any payment to the depositor on that account, the bank would be entitled to a credit for the amount paid on its account with the depositor.[5] Where the bank book of a depositor is written up and balanced, his checks returned and his indebtedness canceled, this constitutes a full settlement of the depositor's account, and, if acquiesced in, it cannot be questioned.[6] The effect of a delay in questioning the accuracy of the balance credited to a depositor on his pass book after it has been written up and returned to him, without objection, if the bank has not suffered by his silence, is to charge him with the burden of establishing fraud, error or mistake in his account. When he does this he is entitled to have it corrected.[7] Where one indebted to a bank has a less sum standing to his credit on deposit on the bank's books, the bank has a right to retain the sum on deposit in part payment of its claim.[8] Where the maker of a note indorsed by the payee to a bank discounting it becomes insolvent before the maturity of the note, having a deposit at the bank, the bank may set off the deposit against the note, and prove the balance, if any, against the maker

[1] Franklin Bank *v.* Byram, 39 Me. 489.

[2] Tradesman's Bank *v.* Merritt, (1829) 1 Paige Ch. 302.

[3] Oddie *v.* National City Bank, (1871) 45 N. Y. 735.

[4] Judy *v.* Farmers & Traders' Bank, (1884) 81 Mo. 404.

[5] Ilgenfritz *v.* Pettis County Bank, (1886) 21 Mo. App. 558.

[6] Peddicord *v.* Connard, 85 Ill. 102.

[7] Frank *v.* Chemical National Bank of New York, (1874) 37 N. Y. Super. Ct. 26.

[8] Union Bank *v.* Cochran, 7 G. & J. (Md.) 138.

in insolvency.[1] A bank holding overdue paper of one of its depositors, would not be bound, though it might have the right, to apply his deposits to the payment of the paper.[2] A bank holding and owning a depositor's past-due note, the amount of which may exceed the amount of his deposit, may, however, hold the deposit account against the note, and refuse to pay checks drawn against the deposit.[3] Where a note was discounted at a bank, for the benefit of the first indorser, and the money was passed to his credit as a deposit, and a portion of it remained in the bank until the note became payable, the Maine Supreme Court of Judicature held that it was optional with the bank to retain this money, in part payment of the note or not; that the omission to retain it did not destroy the bank's right to recover the full amount from another indorser.[4] A bank may secure and discharge any obligation it may assume for a depositor, or which may be imposed upon it by operation of law, as in garnishment proceedings, by retention of a sufficient sum from the deposits in its possession made by the depositor.[5] A bank is not bound to apply subsequent deposits to the payment of a note for the protection of a guarantor.[6] A bank may apply to the discharge of the indebtedness of a depositor on a note which the bank may have discounted, which has not been paid at maturity, all funds of his held at the date of the maturity of the note, or afterwards acquired in the course of business with him, whether a general deposit or commercial paper placed by him in bank for collection.[7] But a bank has no lien upon the deposit of a cus-

[1] Demmon *v.* Boylston Bank, (1849) 5 Cush. (Mass.) 194. As to the application of a deposit to a note of the depositor falling due in a bank, see Mahaiwe Bank *v.* Peck, (1879) 127 Mass. 298. In Ætna National Bank *v.* Fourth National Bank, (1871) 46 N. Y. 82, it appeared that certain depositors remitted to a bank a check for deposit, with a letter saying, "Please credit to our account and charge us our note of five thousand dollars due 4th inst." The bank received the check and credited it to the depositors on the third, and on that day applied it to the payment of a past-due note of $5,000 made by the depositors and payable at the bank. It was held that the letter accompanying the check was not an assignment of the fund to the holder of the note due the fourth, and that he could not maintain an action against the bank.

[2] Citizens' Bank of Steubenville *v.* Carson, (1862) 32 Mo. 191.

[3] Ehlermann *v.* St. Louis National Bank, (1883) 14 Mo. App. 591.

[4] Ticonic Bank *v.* Johnson, 21 Me. 426.

[5] McEwen *v.* Davis, (1872) 39 Ind. 109.

[6] Bank *v.* Shreiner, 110 Pa. St. 188.

[7] Muench *v.* Valley National Bank, (1881) 11 Mo. App. 144.

tomer for the purpose of indemnifying itself against a possible loss upon unmatured commercial paper of the customer discounted by the bank.[1] And a bank holding the note of a depositor for a certain sum can, on the morning of the last day of grace upon such note, apply to its payment any money of the depositor then remaining on deposit in the bank.[2] There is no such lien on the funds deposited with a bank in its favor as will allow it to apply the funds of a depositor upon an indebtedness or liability of his not yet due.[3] Neither can a bank retain the money of a depositor to meet a note, the payment of which the

[1] State Savings Association *v.* Boatmen's Savings Bank, (1881) 11 Mo. App. 292.

[2] Home National Bank *v.* Newton, (1881) 8 Bradw. (Ill.) 563. This was an action brought by the payee of a check drawn by one Newell upon the bank, which the bank declined to pay for want of funds of the drawer, it having applied his balance to a note of his falling due on the day when this check was presented, the application of the balance being made before the presentation of the check with others for payment. *Arguendo*, the appellate court referred to the following cases, first as to when an action can be brought on paper due with days of grace: Walter *v.* Kirk, 14 Ill. 55; Reese *v.* Mitchell, 41 Ill. 365; Osborn *v.* Moncure, 3 Wend. 170; Smith *v.* Aylesworth, 40 Barb. 104; Wilcombe *v.* Dodge, 3 Cal. 260; Staples *v.* Franklin Bank, 1 Met. (Mass.) 43; Greeley *v.* Thurston, 4 Greenl. (Me.) 479; Dennie *v.* Walker, 7 N. H. 201; Farmers' Bank *v.* Duvall, 7 G. & J. (Md.) 89; Wilson *v.* Williman, 1 Nott & McC. (S. C.) 440; Coleman *v.* Ewing, 4 Humph. 241; Flint *v.* Rogers, 3 Shepley, 67; Leftley *v.* Mills, 4 Term R. 170. They then referred to cases as to the presentment of such notes: Griffin *v.* Goff, 12 Johns. 423; Jackson *v.* Newton, 8 Watts, 401; Farmers' Bank *v.* Duvall, 7 G. & J. (Md.) 78; Mechanics' Bank *v.* Merchants' Bank, 6 Met. (Mass.) 13. They then said: "As a bill or note is payable on the last day of grace, or, when there is no grace, on the day of its maturity, the maker or acceptor has the right to pay it on that day, though he cannot pay it on the day before without the consent of the holder. By making his note payable at the Home National Bank, Newell authorized the bank to pay it at maturity. He constituted the bank his agent, and directed it to pay the note on the day it fell due. The act of making the note payable there, was, as we have already seen, a direction to the bank to appropriate any moneys he might have on deposit to the payment of his note, so far as might be required for that purpose, on the day of its maturity. The law knows no parts of a day in respect to the maturity of commercial paper; Newell's note was equally due at ten o'clock in the morning as at three in the afternoon, and it is no answer to say that an action for its non-payment could not be brought against him for its non-payment until the following day. He authorized his agent to pay it on the day of its maturity, and this must be construed to mean at any hour of the day."

[3] Merchants' National Bank *v.* Ritzinger, 20 Bradw. (Ill.) 27; Jordan *v.* National Shoe & Leather Bank, 74 N. Y. 467; s. c., 30 Am. Rep. 319; Bank *v.* Jones, 2 Pennypacker (Pa.), 377.

depositor may have guaranteed, the note not being due at the time.[1] Where the maker of a note held by a bank has funds in the bank on general deposit when the note falls due, the bank is bound to apply the funds to his credit in payment of the note; if it fails to do so, the indorser upon the note will be thereby discharged from liability.[2] A bank holding a depositor's note must charge it against his account at maturity, or else the indorser will be discharged.[3] A bank will be bound to pay a note payable at its counter, of which it is the owner, with any general deposit of the maker in its hands. Should it let the note go to protest, the indorsers would be discharged.[4] A bank may refuse to apply a deposit of the maker of a note after maturity, so as to relieve the indorser.[5] In the absence of express directions, or an agreement to that effect, it is optional with a bank whether it will apply a general deposit made by the maker of a note held by it which is past due, on the note or not. It is under no obligation to do so, even as to an indorser. The general deposit does not of itself operate as a payment of such a note.[6] A debt due by a depositor to a bank will be extinguished by a check drawn in payment of it, the check operating as an appropriation of the fund from the time of its presentment.[7] The Supreme Court of Missouri have affirmed a holding of a lower court that, where a bank had received from a non-resident money which it had agreed to invest for him in real estate security, and having passed the same to his credit, led him to believe that the investment had been made, and subsequently assigned its assets for the benefit of its creditors, the relation of trustee and *cestui que trust* existed and not that of depositor and depositary between them, and that the bank was liable for wrongfully mixing the money with its own.[8] In a case where a draft was deposited in a bank, drawn against by a check, and the check certified to the bank in which it was to be deposited, and before the check arrived the bank certify-

[1] Commercial National Bank *v.* Proctor, (1881) 98 Ill. 558.

[2] McDowell *v.* Bank of Wilmington & B., 1 Harr. (Del.) 369.

[3] Bank *v.* Foreman, 27 W. N. C. (Pa.) 154.

[4] Bank *v.* Henninger, 105 Pa. St. 496. As to the duty of a bank to sureties on promissory notes as to deposits in its hands, see Bank *v.* LeGrand, 13 W. N. C. (Pa.) 317.

[5] Huckstein *v.* Herman, 1 Walk. (Pa.) 92.

[6] National Bank of Newburgh *v.* Smith, (1876) 66 N. Y. 271; s. c., 23 Am. Rep. 48.

[7] Laubach *v.* Leibert, 87 Pa. St. 55.

[8] Harrison *v.* Smith, (1884) 83 Mo. 210.

ing it had made an assignment, it was held that the fund remained in the first bank impressed with the trust, and that the relation of general creditors was not created between the depositors and the bank.[1] A court in Illinois having by order made a bank a depository of court funds and of funds of its officers, a clerk of the court made a deposit of funds belonging to the court in the bank, just as other depositors did, the money being commingled with that of the bank, and there being no agreement to keep the funds separate. The bank became insolvent and was placed in the hands of a receiver. The Illinois Supreme Court held that the deposit being a general one, and not a mere naked bailment, and there being no means of identifying the money deposited, even if the assets of the bank were in the hands of the receiver, it was error to require the receiver to pay the deposit in full; that the clerk was only entitled to share *pro rata* with other depositors and creditors of the bank.[2] Where the circumstances under which a lost check came into plaintiff's possession were so suspicious that a person of ordinary prudence ought to have hesitated and examined further before buying, the Supreme Court of Louisiana held that no recovery could be had on it.[3] Where a bank check was received in payment, during banking hours, the day it was drawn, in the usual course of business, under circumstances not suspicious, and no negligence was shown from which bad faith could be inferred, the same court held that the holder might recover from the drawer, though the check had been lost or stolen.[4] A bank having, without instruction, paid a forged

[1] Stoller *v.* Coates, (1885) 88 Mo. 514, holding the bank chargeable with the amount of the converted fund as a preferred demand. In State ex rel. Girardey *v.* Southern Bank, 33 La. Ann. 957, it appeared that the Bank of Commerce sent to the Southern Bank for collection three checks on other banks in New Orleans. The checks were collected and the proceeds passed to the credit of the Bank of Commerce in its general account, as it had given no instructions for any special disposition of the money, but, on the contrary, drew against the proceeds of these checks as an ordinary depositor. On the same day that the checks were collected the assets of the Southern Bank were seized by the sheriff, and receivers were appointed. The Bank of Commerce claimed in this case the *restitutio ad integrum* of the proceeds of the three checks. The Supreme Court held that the Bank of Commerce was an ordinary depositor of the Southern Bank; that the proceeds of the checks were mixed with its general funds, and the Bank of Commerce was no more than an ordinary creditor.

[2] Otis *v.* Gross, (1880) 96 Ill. 612.

[3] Vairin *v.* Hobson, 8 La. 55.

[4] Marsh *v.* Small, 3 La. Ann. 402.

acceptance, and sent the same by mail to the firm whose names were forged as acceptors, the Kansas Supreme Court held, were not thereby entitled to a credit for the amount of the payment against the firm. The firm, as the court viewed it, were under no legal obligation to immediately examine the acceptance upon its being received by them, to ascertain whether it was genuine or not, and were not chargeable with negligence for not discovering the forgery immediately. In such a case it was sufficient to give notice when the forgery was discovered.[1] One having inclosed a note in a letter to a bank and asked the bank to discount it and place the proceeds to the writer's credit, and in that event to charge a certain overdraft of a corporation against the credit, and the bank having declined to discount the note, the United States Supreme Court held that the bank had no right to hold the note as collateral for the overdraft.[2]

§ 324. **Checks, generally.**— Checks, like bills, are generally negotiable instruments payable to bearer, sometimes to order, requiring as essentials a drawer, drawee and payee.[3] That it shall be instantly payable on demand is an essential characteristic of a check upon a bank.[4] The payment of a check, before made, can be countermanded by the drawer.[5] Although not identical with a bill, a check on a bank is, in many respects, governed by the same rules; and when payable to order is negotiable by indorsement.[6] The effect of drawing a check by a depositor upon his banker is to transfer the sum named to the payee, provided the depositor has that sum to his credit on the books of the banker, and an assignment of the check carries the title to the

[1] First National Bank *v.* Tappan, (1870) 6 Kans. 456.

[2] Bank of Montreal *v.* White, (1880) 14 Sup. Ct. Rep. 1191.

[3] Hewitt *v.* Goodrich, 10 La. Ann. 340. In Ridgley National Bank *v.* Patton 109 Ill. 479, an instrument drawn by a depositor in this form, after giving the date and the name of the bank: "Pay to A. and B. for account of C. & Co., ten hundred and eighteen 23-100 dollars," and signed by the depositor, was held to be a valid check, and that it operated to transfer that sum out of the funds of the drawer in bank to the drawee for the purposes named in the check. For an illustration of what would be a banker's check and not an ordinary bill of exchange, see Harrison *v.* Wright, (1884) 100 Ind. 515.

[4] Merchants' National Bank *v.* Ritzinger, 118 Ill. 484.

[5] Albers *v.* Commercial Bank, (1884) 85 Mo. 173; Bank *v.* Bank, 118 Pa. St. 294.

[6] Barbour *v.* Bayon, 5 La. Ann. 304.

fund to each successive holder.[1] But a banker is not bound to pay the check of a depositor in anything but money. So, where a depositor drew a check upon his banker for Chicago exchange, which he was to send to his creditors at their request, the Appellate Court of Illinois held that these creditors could not, upon failure of the depositor to send the Chicago draft, maintain an action against the banker upon the original check drawn upon him.[2] A bank check payable in "current funds" is payable in whatever is current by law as money.[3] When a check is drawn upon a bank payable to the drawer's order and assigned by him, and he has not sufficient money to his credit to pay the check in full, the bank will be under no obligation to pay, and an assignee can have no recovery upon such a check in an action against the bank.[4] A draft given on a bank in the ordinary course of business does not constitute an equitable assignment of the fund.[5] And, in this case, it was held that it was not sufficient to constitute such an assignment that the draft was drawn by a bank against its reserve fund in another city, and was given in exchange for clearing-house certificates upon the representation of its president that it owed a heavy debt at the clearing house which it was unable to meet, and his further statement showing the amount of the reserve fund against which the draft was drawn.[6] A bank by retaining, on the settlement of a depositor's account, the exact

[1] Merchants' National Bank *v.* Ritzinger, 20 Bradw. (Ill.) 27; Bank of America *v.* Indiana Banking Co., 114 Ill. 483. As to the drawing of a check by a depositor upon the bank holding the deposits operating to transfer the title to the sum named in the check, see Foster *v.* Paulk, 41 Me. 425; Hogue *v.* Edwards, (1881) 9 Bradw. (Ill.) 148; Union National Bank *v.* Oceana County Bank, 80 Ill. 212. And that the payee may sue the bank therefor, see Brown *v.* Pierce, 80 Ill. 214; C. M. & F. Ins. Co. *v.* Stanford, 28 Ill. 168; Bickford *v.* First National Bank, 42 Ill. 239; Brown *v.* Leckie, 43 Ill. 497; Seventh National Bank *v.* Cook, 73 Pa. St. 485.

[2] Hogue *v.* Edwards, (1881) 9 Bradw. (Ill.) 148. A rehearing of this case was denied in Hogue *v.* Edwards, (1881) 9 Bradw. (Ill.) 263.

[3] Bull *v.* Bank of Kasson, 123 U. S. 105.

[4] Coates *v.* Preston, 105 Ill. 470. In Pack *v.* Thomas, 13 Smedes & Marsh. (Miss.) 11, it was held that it was not competent to prove by parol that a check payable in "dollars" simply, was intended by the parties to be paid in depreciated bank notes, as that would be to vary a written contract by parol.

[5] Bank *v.* Millard, 10 Wall. 152; Bank *v.* Schuler, 120 U. S. 511; s. c., 7 Sup. Ct. Rep. 644.

[6] Fourth Street National Bank *v.* Yardley, (1893) 55 Fed. Rep. 850 (a bill against the receiver of the bank to charge him as trustee of a fund).

amount of an outstanding check, impliedly accepts the check, and subjects itself to an action by the holder upon the check.[1] An unaccepted and uncertified check not being an equitable assignment to the credit of the holder, is but an order which may be countermanded.[2] Should the paying teller of a bank after a notice to the bank by the drawer of a check not to pay it, and his promise that he would not do so, afterwards pay it to the holder, the drawer may recover from the bank the amount of the check so paid.[3] A check upon a bank is payable in the kind of funds deposited prior to its date, and a subsequent agreement between the depositor and the bank that other funds would be received is not binding upon the payee of the check.[4] It appeared in an Illinois case that at a time when the banks in that state were receiving and paying out the paper of Illinois banks which were of doubtful solvency, and their paper at a discount, two bankers, in the usual course of their business, had mutual accounts growing out of remittances and collections, and the relations existing between them were such that the depositor could withdraw his funds at pleasure, and the receiver of the deposits could in like manner return them. The Supreme Court of that state held that, in the absence of any agreement between them on the subject, the holder of the deposits would be compelled to pay, or return in current funds or funds at par. But the banker who owned the deposit, with a considerable balance to his credit with his correspondent, having notified the latter by letter that he should require that any remittances he might desire should be made in the paper of certain banks, which were specified in his letter, it was held that this direction left the holder of the deposits at liberty to make the remittances in bills of any of the banks so designated, which the owner of the deposits would be compelled to receive at their nominal value. Further, that after the receipt of such letter, the holder of the deposits was authorized to remit to the owner the entire balance standing to his credit, with-

[1] Saylor *v.* Bushong, 100 Pa. St. 27. As to the drawer of a bank check being relieved of liability by a delay of nine days' presentment of a check, see Kinyon *v.* Stanton, 44 Wis. 479; Cork *v.* Bacon, 45 Wis. 192.

[2] Florence M. Co. *v.* Brown, 124 U. S. 385.

[3] Schneider *v.* Irving Bank, (1865) 1 Daly, 500; s. c., 30 How. Pr. 190. As to the duty of a bank in the payment of checks drawn upon it by a depositor, see Dodge *v.* National Exchange Bank, (1870) 20 Ohio St. 234.

[4] Marine Bank of Chicago *v.* Ogden, (1862) 29 Ill. 248.

out further order, in the class of paper designated in the letter, at its nominal value, or in the paper of any one of the banks designated. Further, this right of the holder of the deposits would not be affected by the fact that subsequent to the notice given him, and before he had received any further notice on the subject, the paper of such banks had continued to depreciate in value. It appeared also in this case that the holder of the deposits had transmitted to the owner the entire balance due him in a package of these bills; the latter retained it a week without opening it to learn the character of its contents, knowing it was a remittance from his correspondent, and the amount of it, and did not notify the correspondent that he would not receive it. The court held that by such delay he waived even any right he may have had to refuse to receive, at its nominal value, any of the paper of banks contained in the package.[1] An individual depositor may draw a check in favor of a *bona fide* creditor and appropriate his funds in a bank to such creditor, vesting him with full power to sue the bank and recover upon the check, notwithstanding an indebtedness to the bank of a partnership of which the depositor is a member.[2] A check duly notified to the bank upon which it is drawn constitutes an equitable assignment of the fund on which it is drawn.[3] A check upon a bank certified by its teller is equivalent to a bill of exchange accepted by the bank, and the bank is liable on the certified check to a *bona fide* holder whether it had funds of the drawer or not.[4] A check drawn by one *in extremis*, with directions to the payee to defray the funeral expenses of the drawer from the amount, and to pay the balance to his heirs, not accepted by the bank at the death of the drawer, has been held not to have operated as an assignment of the fund so as to make the bank liable to the payee.[5] The Indiana Supreme Court has held that a banker's check drawn upon the drawer's banker without words of transfer, and drawn upon no

[1] Cushman *v.* Carver, (1869) 51 Ill. 509. See, also, Marine Bank of Chicago *v.* Rushmore, 28 Ill. 463; Marine Bank of Chicago *v.* Chandler, 27 Ill. 525.

[2] International Bank *v.* Jones, 119 Ill. 407.

[3] Gordon & Gomila *v.* Muchler, 34 La. Ann. 604.

[4] Meads *v.* Merchants' Bank of Albany, (1862) 25 N. Y. 143.

[5] Second National Bank *v.* Williams, 13 Mich. 282. That a check is an appropriation of so much money in the bank to the payee and holder, see Chouteau *v.* Rowse, (1874) 56 Mo. 65; Lewis *v.* International Bank, (1883) 13 Mo. App. 202.

particular designated fund, did not of itself, either as between the drawer and drawee, or drawer and payee or holder of the check, act as an appropriation or equitable assignment of a fund in the hands of the drawee; nor did it operate as an assignment of a part of the drawer's chose in action against the drawee; and, hence, the holder of the check was not entitled to a preference as against the depositors and the general creditors of an insolvent drawer.[1] If bank bills are deposited as depreciated paper, the depositor has no right to draw for funds at par or expect payment on a check thus drawn.[2] A right of action is given to the drawer of a check in case he has funds in bank to meet it by the refusal of the bank to pay it, if the refusal to pay is without his authority.[3] The presenting of a check to a bank on which it is drawn for payment, and the bank's stamping it paid and canceled, although not in fact paid, but subsequently returned to the collecting bank presenting it, would not be such a payment as would discharge the drawer.[4] A bank paying a check drawn to order, without the indorsement of the payee, before it can refuse to pay upon demand by the payee having possession of the paper, is bound to prove that the payee has parted with his title.[5] To a national bank's action to recover an overdraft which amounts to a simple loan, the omission of an officer of the bank to exact security for the money loaned cannot be made a ground of defense.[6] A banker cannot set off a demand he holds against the person presenting a check for payment.[7] A check drawn upon a bank for more than the amount of the drawer's funds on deposit creates no

[1] Harrison *v.* Wright, (1884) 100 Ind. 515.

[2] Willetts *v.* Paine, (1867) 43 Ill. 432. See Lawrence *v.* Schmidt, 35 Ill. 440; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332.

[3] Citizens' National Bank of Davenport *v.* Importers', etc., National Bank of New York, (1887) 44 Hun, 386.

[4] McIntosh *v.* Tyler, (1888) 47 Hun, 99; citing Turner *v.* Bank of Fox Lake, 4 Abb. Ct. of App. Dec. 434; s. c., 3 Keyes, 425; Burkhalter *v.* Second National Bank, 42 N. Y. 538; Kelty *v.* Second National Bank, 52 Barb. 328.

[5] Citizens' National Bank of Davenport *v.* Importers', etc., National Bank of New York, (1887) 44 Hun, 386.

[6] Union Gold Mining Co. *v.* Rocky Mountain National Bank, (1873) 2 Colo. 248.

[7] Brown *v.* Leckie, (1867) 43 Ill. 497. The court said: "In the case of Cromwell *v.* Lovett, 1 Hall, (N. Y.) 56, it was held that a check on a banker given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means to procure the money. The holder, in such a case, becomes the agent of the drawer to collect the money, and if guilty of no negligence whereby an actual injury is sustained by the owner, he will not be answerable, if,

lien upon, and will give the payee no right to the actual balance, until the bank has agreed to pay it *pro tanto*.[1] The Illinois Supreme Court has held that the holder of a bank check, who has paid value for it, is entitled to as much of the funds of the drawer on deposit as the check calls for, and, when presented for payment, the bank on which it is drawn will become the holder of the drawer's money to the use of the holder of the check, and will be bound to account to him for the amount unless other equities have intervened.[2] The rights of the holder of the check and the bank are fixed from the time the check is presented for payment, and the bank will have no right, subsequently, to pay other checks or other demands either to itself or to others which may afterwards be presented, or which may afterwards accrue.[3] A bank receiving an indorsed check for a special purpose, not in the regular course of banking business, has been held to be responsible for an erroneous appropriation of the proceeds.[4] The payee of a check has been held not responsible to a bank for amount

from any peculiar circumstances attending the bank, the check is not paid. And in a suit against the drawer for the consideration of such a check, the holder may treat it as a nullity, and resort to the original cause of action."

[1] Dana *v.* Boston Third National Bank, (1866) 13 Allen, (Mass.) 445.

[2] Fourth National Bank of Chicago *v.* City National Bank of Grand Rapids, 1873) 68 Ill. 398.

[3] Ibid. Mr. Justice BREESE said: "The universal custom informs us what the contract of all the parties to such transaction is. It informs us that the banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may specify, and to the person presenting them, and with the whole world the banker agrees that whoever shall become the owner of such check shall, upon presentation thereof, become thereby the owner, and entitled to receive the amount specified in the check, provided the drawer shall at that time have that amount on deposit. It was further said in Munn *v.* Burch, 25 Ill. 35, to deny to the holder of a bank check both a legal and equitable right, after presentation of the check, to the money of the drawer in the hands of a banker, would destroy the most valuable feature of bank deposits and checks. In the very nature of such transactions a banker's lien cannot extend to the money left on deposit with him, according to the customs and usages of banks. It has never been so extended, but is confined to securities and valuables which may be in the banker's custody as collaterals. The credit must be given on the credit of the securities or valuables, either in possession or expectancy. Russell *v.* Hadduck, 3 Gilm. 233. This is the extent of a banker's lien." See, also, Johnson *v.* Ward, 2 Bradw. (Ill.) 261; Brahm *v.* Adkins, 77 Ill. 263. When the holder of a check is not subject to equities existing between the original parties. Rochester Bank *v.* Harris, (1871) 108 Mass. 514; Ames *v.* Meriam, (1867) 98 Mass. 294.

[4] Parker *v.* Hartley, 91 Pa. St. 465.

paid to him, without fraud on his part, although paid by mistake.[1] The mere presentment of a check does not fix upon a bank the liability to pay it.[2] Should a bank, without funds, pay a check long overdue, it would take it subject to all the equities of the drawer.[3] A bank, though it may have by mistake paid a check and placed it upon the canceling knife, would not be thereby prevented from recovering upon it against the drawer.[4] One receiving a counterfeit bill from a bank in payment of a check may return it in a reasonable time after discovering that it is not genuine.[5] The drawer of a check and his sureties will be discharged by the acceptance of the drawee, with the consent of the payee of a check conditionally fixing some other time or mode of payment than is implied in the language and terms of the check.[6] No law requires the drawee of a check to delay payment until advice that it has been drawn.[7] A check to bearer, taken, though from one who obtained it unfairly, yet immediately after its issue, and without notice, entitles the holder to recover the sum it calls for.[8] Where a check is drawn on a bank in which the drawer has no funds it need not be presented at all, in order that an action may be maintained upon it.[9] Should a bank pay a post-dated check before the day on which it is dated, it will be a payment to its own wrong, and no defense to an action for the amount of the fund by one to whom it may have been assigned in good faith.[10] A bank on which a check is drawn is not constituted an agent for the owner of the check to receive the proceeds by his sending the check to it through the mail.[11]

[1] Hull *v.* Bank, Dud. (S. C.) 259.

[2] Albers *v.* Commercial Bank, (1884) 85 Mo. 173.

[3] Lancaster Bank *v.* Woodward, 18 Pa. St. 357.

[4] State Savings Association *v.* Boatmen's Savings Bank, (1881) 11 Mo. App. 292.

[5] Boyd *v.* Mexico Southern Bank, (1878) 67 Mo. 537. In Murray *v.* Bull's Head Bank, (1871) 3 Daly, 364, a bank which had through its teller cashed a check drawn on another bank, and part payment was made in a counterfeit bank bill, was held liable for the amount of the counterfeit bill to the owner of the check.

[6] Warrensburg Co-operative Building Assn. *v.* Zoll, (1884) 83 Mo. 94.

[7] Merchants' Bank *v.* Exchange Bank, 16 La. 457.

[8] Clark *v.* Stackhouse, 2 Mart. (La.) 326.

[9] Foster *v.* Paulk, 41 Me. 425.

[10] Godin *v.* Bank of Commonwealth, (1856) 6 Duer, 76.

[11] People *v.* Merchants & Mechanics' Bank of Troy, (1879) 78 N. Y. 269; s. c., 34 Am. Rep. 532.

§ 325. **Certification of checks.**— A bank may render itself liable to the holder and payee of a check by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange.[1] The same result may be accomplished by the bank's writing upon the check the word "good" or any similar words which indicate a statement by it that the drawer has funds in the bank applicable to the payment of the check, and that it will so apply them.[2] Such a certificate discharges the drawer of the check, and, as to him, amounts to a payment.[3] The certifying of a check as "good" is not a mere declaration of an existing fact, but creates a new and binding obligation on the part of the bank. Its meaning is not merely that the check was "good" when certified, but that it shall be "good" when presented for payment. A certified check, therefore, is as truly an absolute, unconditional promise to pay upon demand the sum it specifies, as an ordinary bank note; and *laches* in making the demand is no more imputable in the one case than in the other.[4] The fact that a check may have been properly drawn on a national bank (a public depository) by an officer of the government in favor of a public creditor does not alter the rule that the holder of a bank check cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer.[5] Payment to a stranger upon an unauthorized indorsement of a check will not operate as an acceptance of the check so as to authorize an action by the real owner to recover the amount of the check as upon an accepted check.[6] Although certified checks pass from hand to hand as cash, they are not cash, or currency, in the legal sense of the terms, and they do not lose, on that account, any of the char-

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604; Espy *v.* Bank of Cincinnati, 18 Wall. 604.

[2] Cook *v.* State Bank of Boston, 52 N. Y. 96.

[3] Bank *v.* Leach, 52 N. Y. 350; Meads *v.* Merchants' Bank, 25 N. Y. 143; Mussey *v.* Prest., Directors, etc., Eagle Bank, 9 Met. (Mass.) 311; Willets *v.* Phœnix Bank, 2 Duer, 121.

[4] Willets *v.* Phœnix Bank, (1853) 2 Duer (N. Y.), 121. Holding upon the doctrine of the text that the plaintiffs, holders for value, were entitled to recover the sum advanced by them upon four checks certified by the bank, although payment was not demanded until two months after the checks were certified, and in the interval the drawer had withdrawn, upon other checks, all his funds from the bank.

[5] Bank of the Republic *v.* Millard, 10 Wall. 152.

[6] First National Bank of Washington *v.* Whitman, (1876) 94 U. S. 343.

acteristics of bills of exchange, and, therefore, when dishonored, the holder has a right to look to the drawer for payment.[1] The only effect of certifying a check "good" is to give it additional currency by carrying with it the evidence that it was drawn in good faith on funds to meet its payment, and lending to it the credit of the drawee in addition to the credit of the drawer. Beyond this it does not differ from an uncertified check.[2] The indorsement, by the proper officer of a bank, upon a check drawn upon it payable to bearer, that it is "good," would be *prima facie* an admission on the part of the bank that the money drawn for is in bank, subject to the order of the drawer. This presumption, however, may be repelled by proof, as that the admission was made by mistake.[3] Certifying a check is only an agreement that the signature of the drawer is genuine, and that he has funds to meet it.[4] A bank will not be relieved from its responsibility to the innocent holder of a check certified by its officer authorized to do so, by the fact that he may have transgressed his authority and certified checks where the drawer had no funds.[5] Where a check had been delivered by the drawer to the payee for accommodation, and the payee had transferred it without indorsement to another, who took it to the bank on which it was drawn for certification, and while it was so in the possession of the bank the drawer notified the bank not to pay it, it was held by the Supreme Court of New York that the payment of the check by the bank was unauthorized, and that the drawer could recover the amount from the bank.[6] A bank will not be bound, by a parol representation that a check is good, to pay it whenever presented until barred by limitation, such a representation not being equivalent to a certification; neither would the holder of the check be relieved from the duty of proper diligence in presenting it for payment.[7] The deposit of the drawer of a check upon which it is drawn, is paid as the effect of the holder of the check procuring it to be

[1] Bickford *v.* First National Bank, 42 Ill. 238.

[2] Brown *v.* Leckie, (1867) 43 Ill. 497; citing Rounds *v.* Smith, (1860) 42 Ill. 245; Bickford *v.* First National Bank, 42 Ill. 238.

[3] Smith *v.* Branch Bank at Mobile, (1845) 7 Ala. 880.

[4] Marine National Bank *v.* National City Bank, (1874) 59 N. Y. 67; s. c., 17 Am. Rep. 305. As to the power of a bank to certify checks, see Merchants' Bank *v.* State Bank, 10 Wall. 604.

[5] Hill *v.* Trust Co., 108 Pa. St. 1.

[6] Freund *v.* Importers & Traders' National Bank, (1875) 3 Hun, 689; s. c., 6 T. & C. 236.

[7] Bank of Springfield *v.* First National Bank of Springfield, (1888) 30 Mo. App. 271.

certified instead of collecting it.[1] The drawer of a check will be discharged by the holder's procuring it to be certified instead of collecting it.[2] In case a certificate of "good" on a check be erroneously made by a bank, and the error be discovered and notice given to the bank presenting the check in time for it to make a re-presentment and charge the indorsers, the certifying bank will be relieved from further liability.[3] A new and binding obligation is created on the part of a bank by its certifying a check as "good" to hold sufficient funds of the drawer to meet the check; and the holder's right is not impaired by a delay on his part in demanding payment.[4] The act of a bank certifying the genuineness of a check and directing its payment by a correspondent bank, operates as a promise to pay the check upon presentation at the correspondent bank, properly indorsed. The obligation of the bank, as shown by such certification, amounts to a representation that the drawer has funds in the bank with which to pay the check, and that it will retain and pay them to the holder through the designated agency, upon presentation there, properly indorsed.[5] A bank certifying a check drawn upon it by one of its depositors is primarily liable upon it.[6] One taking a check which has been certified by a bank in good faith, for value, in the ordinary course of his business, may recover against the bank although the signature to the check may be a forgery. And it

[1] Bills *v.* National Park Bank, 47 N. Y. Super. Ct. 302.

[2] First National Bank of Jersey City *v.* Leach, (1873) 52 N. Y. 350; s. c., 11 Am. Rep. 708.

[3] Irving Bank *v.* Wetherald, (1867) 36 N. Y. 335, affirming 34 Barb. 323.

[4] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, (1855) 4 Duer, 219. In Mills *v.* State Bank, 5 N. J. Law J. 56, it appeared that on a certain date a check was drawn in favor of the plaintiff on the State Bank, and indorsed by the cashier "good at the Mechanics' Bank." The plaintiff retained the check for two months, when the Mechanics' Bank failed. In this action, on proof that at the date of the failure of the Mechanics' Bank the State Bank had sufficient funds in that bank to meet the check, the plaintiff was held not entitled to recover, on account of her negligence in delaying the presentation of the check for payment for so long a time.

[5] Lynch *v.* First National Bank of Jersey City, (1887) 107 N. Y. 179; s. c., 1 Am. St. Rep. 803; citing Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82; Crawford *v.* West Side Bank, 100 N. Y. 50; Risley *v.* Phenix Bank, 83 N. Y. 318; Oneida Bank *v.* Ontario Bank, 21 N. Y. 490.

[6] Drovers' National Bank *v.* Provision Co., 117 Ill. 100. As to what the liability of a bank upon certified checks results from, see Cooke *v.* State National Bank of Boston, (1873) 52 N. Y. 96; s. c., 11 Am. Rep. 667.

would make no difference that the payee's name was fictitious.[1] The money paid upon a raised check by a bank certifying and paying it may be recovered from the one receiving it, as for money paid under a mistake of fact.[2] The money paid by a bank upon a certified check may be recovered if it prove that the filling in of the check was forged. And the bank will not be estopped from showing the body of the check to be a forgery by the verbal assurance of its teller to the payee that the check was correct in every particular.[3] Payment of a raised check on the faith of a certificate of a bank has been held not to raise an estoppel precluding the bank from recovering back the money paid on it.[4]

§ 326. Acceptance of a check by a bank — illustration.— In a case in the United States Circuit Court for the western district of Missouri it appeared that a cattle company had agreed to sell to one T. a large number of cattle for a fixed sum of money. He offered in payment for the cattle his check on defendant bank. The cattle company refused to accept it unless persons to whom it was indebted would accept it in payment of the debt. The payee of the check telegraphed to the bank asking if it would pay T.'s check for the amount specified, and the bank telegraphed: "T. is good. Send on your paper." The telegram was shown to the creditors of the cattle company, who took the check in payment of their debt. Upon the issues raised by the defendant's answer it was held that the answer by the bank was an acceptance of the check for the sum named in the first telegram, and was sufficient, under Revised Statutes of Missouri (§ 533), providing that an acceptance of a bill of exchange must be in writing, and section 534, providing that an acceptance on a separate paper will bind the acceptor in favor of one to whom it has been drawn, who takes the bill on the faith thereof for a valuable consideration, to render the bank liable to plaintiffs on the check. And in such case, the evident purpose of the inquiry

[1] Hagen *v.* Bowery National Bank, (1872) 6 Lans. 490; s. c., 64 Barb. 197.

[2] St. Nicholas Bank *v.* National Bank of the State of New York, (1876) 3 N. Y. Wkly. Dig. 583; citing Marine Nat. Bank *v.* National City Bank, (1874) 59 N. Y. 67; s. c., 17 Am. Rep. 305.

[3] Security Bank of New York *v.* National Bank of Republic, (1876) 67 N. Y. 458; s. c., 23 Am. Rep. 129.

[4] Marine National Bank *v.* National City Bank, (1874) 59 N. Y. 67; s. c., 17 Am. Rep. 305.

being to obtain assurance of payment before taking the check, the bank was liable under Revised Statutes of Missouri (§ 535), providing that an unconditional written promise to accept a bill before it is drawn shall be deemed an actual acceptance in favor of any person to whom it is shown, and who on the faith thereof receives the bill for a valuable consideration.[1] The same case was before the court again, when there were some further rulings as to the bank's liability on the check by reason of its acceptance by telegram. It was held that the bank which had agreed to accept the check for a certain sum could not refuse payment because the check when presented concluded with the words "with exchange," no place of exchange being mentioned. Still this was mere surplusage, and of no effect.[2] It was also held that a bank check payable to "the order of" the payee was a bill of exchange within the meaning of Revised Statutes of Missouri (§ 553), requiring an acceptance of a "bill of exchange" to be in writing.[3]

§ 327. **Presentment of checks for payment.**— Upon presentation of a check for payment the payee or legal holder becomes the owner, entitled to the sum called for by the check, if that amount stands to the credit of the drawer on the books of the bank.[4] Bank checks being payable immediately on present-

[1] Garrettson *v.* North Atchison Bank, (1889) 39 Fed. Rep. 163. As to principles applicable to bank checks, see Bank *v.* Bank, 10 Wall, 647; Cooke *v.* Bank, 52 N. Y. 96; Jarvis *v.* Wilson, 46 Conn. 90–92; Freund *v.* Bank, 76 N. Y. 355, 356; Bank *v.* Richards, 109 Mass. 413; Whilden *v.* Bank, 64 Ala. 29, 30. As to how an acceptance of a check may be made, see Bank *v.* Bank, 1 N. Y. Leg. Obs. 26; Espy *v.* Bank, 18 Wall. 604; Whilden *v.* Bank, 64 Ala. 32, 33; Bank *v.* Howard, 40 N. Y. Super. Ct. 20. As to a check passing to another for a valuable consideration, see Railroad Co. *v.* Bank, 102 U. S. 14–22; Pope *v.* Bank, 59 Barb. 226; Freund *v.* Bank, 76 N. Y. 353–358.

[2] Garrettson *v.* North Atchison Bank, (1891) 47 Fed. Rep. 867. C. f., Brinkman *v.* Hunter, 73 Mo. 179; Lindley *v.* Bank, 76 Iowa, 629; s. c., 41 N. W. Rep. 381; Hughitt *v.* Johnson, 28 Fed. Rep. 865; Hill *v.* Todd, 29 Ill. 101–103; Clauser *v.* Stone, 29 Ill. 114. As to a defense that presentation of a check for payment was unreasonably delayed, see Bull *v.* Bank, 123 U. S. 111, 112; s. c., 8 Sup. Ct. Rep. 62.

[3] Garrettson *v.* North Atchison Bank, (1891) 47 Fed. Rep. 867, affirming Garrettson *v.* North Atchison Bank, (1889) 39 Fed. Rep. 163. Garrettson *v.* North Atchison Bank, 39 Fed. Rep. 163, and 47 Fed. Rep. 867, were affirmed by the United States Circuit Court of Appeals in North Atchison Bank *v.* Garrettson, (1892) 51 Fed. Rep. 168.

[4] Shaffner *v.* Edgerton, 13 Bradw. (Ill.) 132; Priest *v.* Way, 87 Mo. 16; Munn *v.* Burch, 25 Ill. 35.

ment are not entitled to days of grace.[1] Whether days of grace are to be allowed on a draft in the form of a check depends upon the question whether the instrument is payable on demand or at a future day.[2] A check drawn on a bank ordering it to pay money to a third party or order on a day subsequent to its date would be entitled to grace.[3] A check drawn by one party upon another payable to a third person, due thirty days after date, has been held in a suit by the drawee against the drawer to be entitled to days of grace.[4] An instrument drawn upon the cashier of a bank, payable sixty days after date, has been held to be a bill of exchange, and entitled to days of grace. It was also held in the same case that it was essential to a check, *eo nomine*, that it should be payable on demand.[5] A draft on a bank for money payable at a day subsequent to its date, has been held to be a bill of exchange, and entitled to days of grace.[6] A bank check payable fifteen days after date has been declared in an Indiana case to be an inland bill of exchange, and to have every feature of such a bill.[7] A demand in business hours on the day succeeding that on which a check is drawn is a sufficient presentment.[8] Presentment of a check is excused by the stoppage of its payment by the drawer.[9] The fact that a check may be drawn by a depositor of funds in a bank in favor of the cashier of the bank just previous to the service upon the bank of process in garnishment, has been held not to be in itself evidence of fraud or want of good faith.[10] A bank which had sent another bank a bad check, supposing and affirming that it came from the bank to which it was returned and been paid money by the latter for the check, relying upon this statement, which was erroneous, has been held liable in an action by the latter for the money, as paid under a mistake of fact, although the error in the statement was not discovered until three days after the payment of the money, when the

[1] Barbour *v.* Bayon, 5 La. Ann. 304.

[2] Morrison *v.* Bailey, (1855) 5 Ohio St. 13. When an instrument drawn on a bank is a check and not a bill of exchange, and not entitled to days of grace, see Andrew *v.* Blachly, (1860) 11 Ohio St. 89.

[3] Ivory *v.* Bank of Missouri, (1865) 36 Mo. 475.

[4] Cutler *v.* Reynolds, (1872) 64 Ill. 321.

[5] Woodruff *v.* Merchants' Bank, 25 Wend. 673.

[6] Bowen *v.* Newell, 8 N. Y. 190.

[7] Glenn *v.* Noble, 1 Blackf. (Ind.) 104.

[8] Ocean Co. *v.* Ophelia, 11 La. Ann. 28.

[9] Woodin *v.* Frazee, (1874) 38 N. Y. Super. Ct. 190.

[10] Bank of America *v.* Indiana Banking Co., 114 Ill. 483.

refrain from doing any act that would reasonably have the effect of misleading the bank to its hurt or injury, and not fail to do any act that positive duty requires him to do for the protection of the bank. Should a bank account be balanced on the depositor's bank book, and the book and canceled checks returned to the depositor, after the lapse of a reasonable time, within which the checks and account might be compared, without objection being made, a presumption will arise that the account as balanced and the checks charged in the account are correct. This presumption proceeds upon the ground simply of an implied admission, and is only *prima facie* in its effect.[1] It arises from the natural and usual habits of careful business men to examine and scrutinize such accounts when rendered; but it is liable to be repelled by showing that the error or fraud complained of was not discoverable by the exercise of reasonable care and diligence, or that there was no such appearance of things as to excite the suspicion of a reasonable man, or that, for any reason, the depositor had not had an opportunity to examine the accounts.[2] If a depositor who is in the habit of drawing checks upon his deposit account, should, by word or acts, cause the bank, the latter acting upon such reasonable grounds as prudent business men generally act, to make payment on a forged check, the depositor would not be allowed, as against the bank, to set up the forgery that he, by his conduct, had induced the bank to act on as a genuine check.[3] Where on a forged indorsement a bank has paid a check, the bank is not responsible to the drawer where the person who committed the forgery is identified to the bank by one who believes him to be the payee, and is in fact the person to whom the drawer had delivered the check, and whom he believes to be the payee. And should the drawer of such a check, for more than a month after discovering that it had been paid upon a forged indorsement, neglect to notify the bank that he will hold it responsible therefor, the bank will be released from liability even though it had notice of the forgery as soon as the drawer had.[4] In a depositor's suit against a bank in Maryland, some of the checks paid by the bank were forged by a confidential clerk intrusted by

[1] Wiggins *v.* Burkham, 10 Wall. 129.

[2] Weisser *v.* Denison, 10 N. Y. 68, 76; National Bank *v.* Whitman, 94 U. S. 343, 346.

[3] Hardy & Bros. *v.* Chesapeake Bank, (1879) 51 Md. 562, 586.

[4] United States *v.* National Exchange Bank, (1891) 45 Fed. Rep. 163. As sustaining the first point, see Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Bank of U. S. *v.* Bank of Georgia, 10 Wheat. 333; Price *v.* Neal,

them to make the entry of all checks in their bank book. In making the fraudulent entry of these forged checks in the depositor's bank book the Court of Appeals held that he was not the agent of his employers for any such purpose; also, that the clerk's fraudulent knowledge in regard to acts and transactions outside of and beyond his employment could not be imputed to his principal. The court also held that in this case the jury should have been required to find either that the depositors had knowledge in fact that the forgeries had been committed, or that, from carelessness and indifference to the rights of others, they failed to inform themselves from sources of information readily accessible to them, and which, by the exercise of ordinary diligence of business men, would have disclosed to them the fact that the forgeries had been committed. If such facts were found to exist, then it must be also found, in order to work an estoppel upon the depositor to claim that the checks paid were forged, that the bank acted in honoring and paying forged checks presented after other forged checks had been returned with the balanced bank books to the depositors, in reference to the conduct of the latter in failing to make known an objection to the account, as stated and balanced in the bank book so returned, and that such omission and neglect of the depositors did in fact mislead the bank into the error of paying the forged checks presented after the other forged checks had been returned with the balanced bank book to the bank. The court distinguished De Feriet *v.* Bank of America, 23 La. Ann. 310, in these words: "There, when the first check was forged by the plaintiff's confidential clerk, and paid by the bank, the plaintiff was notified of the draft upon his account and went at once to the bank, and upon being shown the

3 Burr. 1355. As sustaining the second point, see Redington *v.* Woods, 45 Cal. 406; Cooke *v.* United States, 91 U. S. 396; United States *v.* Bank, 6 Fed. Rep. 134. It appeared in the case of Wells, Fargo & Co. *v.* United States, (1891) 45 Fed. Rep. 337, that a pension check, drawn by mistake for $1,280.20 instead of $18, was indorsed by the payee to a bank, and by that bank indorsed for collection to another which indorsed it to the assistant treasurer of the United States, who paid it. The assistant treasurer retained out of money due the collecting bank from the United States the amount of the check. In this action by the collecting bank against the United States for the money retained by the assistant treasurer, it was held that the money collected by the collecting bank upon the pension check which it had paid over to its principal, the forwarding bank, could not be recovered from the collecting bank, and the latter, therefore, could recover the money due it which had been retained from the United States.

check, while he stated that he had not signed the check himself, he refused to denounce it as a forgery. After seeing the clerk, the plaintiff reported back to the bank that the check was all right. The clerk made deposits to make the check good, and the plaintiff himself drew upon the deposits thus made. He continued the forger in his employ; and, subsequently, the same clerk forged another check which the bank paid; and, upon discovery of the second forgery, the plaintiff denounced it. But it was held that, by his conduct in ratifying the act of the clerk in drawing the first forged check, the plaintiff was precluded from holding the bank liable for the payment of the second; that the bank was misled by the approval and ratification of the first forgery, and that it was, therefore, excusable for paying the second forged check drawn in all respects similar to the first. In that case there was no question as to the want of knowledge on the part of the plaintiff of the first forgery committed by the clerk, and his full ratification and adoption of the act, nor was there any in regard to the fact that the bank had been misled."

§ 331. **Payment of raised checks.**— The United States Supreme Court reversed the judgment of the Circuit Court in favor of a depositor against a bank, holding that a depositor in a bank, who sends his pass book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound personally or by an authorized agent, and with due diligence, to examine the pass book and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown by the pass book. Further, it held that if a depositor in a bank delegates to a clerk the examination of his written-up pass book and paid checks returned therewith as vouchers, without proper supervision of the clerk's conduct in the examination, he does not so discharge his duty to the bank as to protect himself from loss, if it turns out that without his knowledge the clerk committed forgery in raising the amounts of some of those checks, and thereby misled the bank to its prejudice, in spite of due care on the part of its officers.[1]

[1] Leather Manufacturers' Bank *v.* Morgan, (1886) 117 U. S. 96. In a well and fully considered opinion, HARLAN, J., for the court reviewed

the leading cases pertinent to the questions before the court, and declared the law in such cases in the following words: "While it is true that the relation of a bank and its depositor is one simply of debtor and creditor (Phœnix Bank *v.* Risley, 111 U. S. 125, 127), and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass book to be written up and returned with the vouchers, is, therefore, *in* effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. In Devaynes *v.* Noble, 1 Meriv. 530, 535, it appeared that the course of dealing between banker and customer, in London, was the subject of inquiry in the High Court of Chancery as early as 1815. The report of the master stated, among other things, that for the purpose of having the pass book 'made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and, the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and, if there appears any error or omission, brings or sends it back to be rectified; or, if not, his silence is regarded as an admission that the entries are correct.' This report is quite as applicable to the existing usages of this country as it was to the usages of business in London at the time it was made. The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it, or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book. It was observed in First National Bank *v.* Whitman, 94 U. S. 343, 346 — although the observation was not, perhaps, necessary in the decision of the case — that the ordinary writing up of a bank book, with a return of vouchers or statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. Such undoubtedly is a correct statement of a general rule. It was made in a case where the account included a check, in respect to which it was subsequently discovered that the name of the payee had been forged. But it did not appear that either the bank or the drawer of the check was guilty of negligence. The drawer was not presumed to know the signature of the payee; his examination of the account would not necessarily have disclosed the forgery of the payee's name; therefore, his failure to discover that fact sooner than he did was not to be attributed to want of care. Without impugning the general rule that an account rendered which has become an account stated, is open to correction for mistake or fraud (Perkins *v.* Hart, 11 Wheat. 237, 256; Wiggins *v.* Burkham, 10 Wall. 129, 132), other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a rea-

sonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself, or to have it made, in good faith, by another for him, by reason of which negligence, the other party relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its correctness." After some discussion of the doctrine of estoppel and the citation of cases bearing upon the doctrine, it is said: "Upon this doctrine substantially rests the decision in Bank of United States *v.* Bank of Georgia, 10 Wheat. 333, 343, where the question was as to the right of the Bank of Georgia to cancel a credit given to the Bank of the United States in the general account the latter kept with the former for the face value of certain bank notes, purporting to be genuine notes of the Bank of Georgia, and which came to the hands of the other bank in the regular course of business and for value. The notes were received by the Bank of Georgia as genuine, but being discovered nineteen days thereafter to be counterfeits, they were tendered back to the Bank of the United States, which refused to receive them. The court held that the loss must fall upon the Bank of Georgia. Mr. Justice STORY, who delivered the opinion of the court, after observing that the notes were received and adopted by the Bank of Georgia as its genuine notes, and treated as cash, and that the bank must be presumed to use reasonable care, by private marks and otherwise, to secure itself against forgeries and impositions, said: 'Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed it is certainly evidence of a neglect of that duty which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank, in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. Even,' he added, 'in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine that the notice and return must be within a reasonable time; and any neglect will absolve the payor from responsibility.' It was, therefore, held that, as the Bank of Georgia could by ordinary circumspection have detected the fraud, it must account to its depositor according to the entry made in its books at the time of receiving the notes. Further on it was said: This court, in the [cases Bank of United States *v.* Bank of Georgia, 10 Wheat. 333, and Cooke *v.* United States, 91 U. S. 389, recognizing the same principle] refers, with approval, to Gloucester Bank *v.* Salem Bank, 17 Mass. 33, 42. In that case it appeared that the Salem Bank exchanged with the Gloucester Bank, for value, certain bank notes which purported to be, and which both banks at the time believed to be, the genuine notes of the Gloucester Bank, and which the latter bank did not, until about fifty days after the exchange, discover to be forgeries. The question was whether the Salem Bank was bound to account for the

value of the notes so ascertained to be counterfeit. Chief Justice PARKER, speaking for the whole court, observed that the parties being equally innocent and ignorant, the loss should remain where the chance of business had placed it, and that in all such cases the just and sound principle of decision was that if the loss can be traced to the fault or negligence of either party, it should be fixed upon him. He said: 'And the true rule is that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent; and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength where the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not, and if he pays them, or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own.' These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth — which he has the means, by ordinary diligence, of ascertaining — and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct." The court then applied the principle just referred to to the facts in this case, and said: "It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts, as is inconsistent with the relations of the parties or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors. We must not be understood as holding that the examination by a depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to

discharge a duty resting primarily upon the principal, cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business." The court, referring to Weisser *v.* Denison, 10 N. Y. 68, 70; Welsh *v.* German-American Bank, 73 N. Y. 424; Frank *v.* Chemical Bank, 84 N. Y. 209, 213, which showed a settled course of decision in the highest court of the state of New York sustaining the grounds upon which the Circuit Court proceeded in giving its judgment, said: "There are, it must be conceded, some expressions in the first two cases which, at first glance, seem to justify the position of counsel. But it is to be observed, in reference to the case of Weisser *v.* Denison, that it is said in the opinion of the court that, as the bank had not taken any action, nor lost any rights, in consequence of the silence of the depositor, the only effect of such silence was to cast the burden upon him to show fraud, error or mistake in the account rendered by the bank. From Welsh *v.* German-American Bank, it is clear that the comparison by the depositor of his check book with his pass book would not necessarily have disclosed the fraud of his check, for the check when paid by the bank was, in respect of date, amount, and name of payee, as the depositor intended it to be, and the fraud was in the subsequent forgery by the clerk of the payee's name. As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass book, the fact that his clerk, or some one else, had forged the payee's name in the indorsement. The latest expression of the views of the Court of Appeals of New York is in Frank *v.* Chemical National Bank. From what is there said it is evident that that learned tribunal does not give its sanction to the broad proposition that a depositor who obtains periodical statements of his account, with the vouchers, is under no duty whatever to the bank to examine them, and give notice, within a reasonable time, of errors discovered therein. The court in that case, speaking by Judge ANDREWS, who delivered the opinion in Welsh *v.* German-American Bank, refers to Weisser *v.* Denison. After observing that it was unnecessary to restate the ground of that decision, and adverting to the argument that where a pass book was kept, which was balanced from time to time and returned to the depositor, with the vouchers for the charges made by the bank, including forged checks, the latter is under a duty to the bank to examine the account and vouchers, with a view to ascertain whether the account is correct, he proceeds: 'It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender their vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank, which it would not have suffered if such examination had been made and the bank had received timely notice of the objections, preclude the depositor from afterwards questioning its correctness. But where bogus checks have been paid and charged in the account and returned to the depositor,

he is under no duty to the bank to so conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally, and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which, in the first instance, is the loss of the bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the bank pays forged checks it commits the first offense. It cannot visit the consequences upon the innocent depositor, who, after the fact, is also deceived by the simulated paper. So, if the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them. The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger.' The court distinguished Manufacturers' National Bank *v.* Barnes, 65 Ill. 69, to which they were referred in behalf of the depositor. Afterwards there was a reference to other cases, as follows: 'An instructive case is that of Dana *v.* Bank of the Republic, 132 Mass. 156, 158, where the issue was between a bank and its depositor in reference to a check which the latter's clerk altered after it had been signed, and before it was paid by the bank. The court said that the plaintiffs, who were the depositors, owed to the bank 'the duty of exercising due diligence to give it information that the payment was unauthorized; and this included not only due diligence in giving notice after the forgery, but also due diligence in discovering it.' If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence, will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury from which it might have protected itself but for the negligence of the plaintiffs. Whether the plaintiffs were required, in the exercise of due diligence, to read the monthly statements or to examine the checks, and how careful an examination they were bound to make, and what inferences are to be drawn, depend upon the nature and course of dealing between the parties, and the particular circumstances under which the statements and checks were delivered to them.' So in Hardy *v.* Chesapeake Bank, 51 Md. 562, 591, which was also a case where checks forged by the confidential clerk of the depositor had been paid by the bank, and, as shown by the pass book, were charged to his account, the court, upon an elaborate review of the authorities, said, upon the general question, that 'there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow on such cases, in the examination and comparison of the debits and credits contained in his bank or pass book, in order to detect any errors or mistakes therein. More than this, under ordinary circumstances, could not be required.'"

CHAPTER XII.

COLLECTIONS.

§ 332. **General rules.**— An indorsement of a promissory note "for collection" makes the indorsee an agent for the collection of the note.[1] Such an indorsement is restrictive and cannot be shown, by parol, to be absolute.[2] A bank, though it may have no interest in it, for certain purposes must be considered the holder of a note left with it for collection.[3] A bank has authority only to receive payment of a note placed with it for collection; it cannot sell or transfer it.[4] A bank receiving notes for collection from its regular correspondent, cannot apply them to balancing the account between them where it knows the notes were sent for

[1] Rock County National Bank *v.* Hollister, 21 Minn. 385.

[2] Third National Bank *v.* Clark, 23 Minn. 263. As to kind of agency a bank has when a note or bill is placed with it for collection, its duty and its liability for negligence in the discharge of that duty, see Bank of Mobile *v.* Huggins, (1841) 3 Ala. 206. In this case the Alabama Supreme Court differs as to the duty to cause the note to be protested with the New York courts in Smedes *v.* Utica Bank, 20 Johns. 372: s. c., on error, 3 Cowen, 663; McKinster *v.* Bank of Utica, 9 Wend. 46; s. c., on error, 11 Wend. 473. They refer to Colt *v.* Noble, 5 Mass. 167; Tunno *v.* Lague, 2 Johns. Cas. 1. The question of damages in such cases is fully discussed by the Alabama courts, and they comment upon Bank of Washington *v.* Triplett & Neale, 1 Pet. 26, and Van Wart *v.* Woolley, 3 B. & C. 439; Hamilton *v.* Cunningham, 2 Brock. 350; Stowe *v.* Bank of Cape Fear, 3 Dev. 408; Branch Bank at Montgomery *v.* Knox, 1 Ala. 148. They differ with the Louisiana Supreme Court in Durnford *v.* Patterson, 7 Mart. 460; Crawford *v.* Louisiana State Bank, 1 Mart. (N. S.) 214; Montillet *v.* Bank of the United States, 1 Mart. (N. S.) 365; Pritchard *v.* Louisiana State Bank, 2 La. 415; Miranda *v.* City Bank, 6 La. 741. They comment on Allen *v.* Suydam, 17 Wend. 368; St. John *v.* O'Connel, 7 Port. (Ala.) 466.

[3] Burnham *v.* Webster, 19 Me. 232.

[4] Wolff *v.* Walter, (1874) 56 Mo. 292; Fuller *v.* Bennett, 55 Mich. 357.

collection and that they belonged to a third person.[1] Paper coming from one bank to another indorsed, and with directions to collect it, and there being nothing to indicate that the paper does not belong to the bank remitting it, may be regarded the paper of the latter, although it may have been deposited by the indorser in the remitting bank for collection.[2] One depositing with a bank for collection negotiable paper payable at a distant point, is chargeable with knowledge of the custom of banks to intrust the paper to other banks for collection at the place where payment is to be made. The bank receiving such paper becomes responsible to the depositor as agent, with authority to employ another bank to collect it, and will not be liable for the negligence of its correspondent in making the collection, if it has used reasonable care in the selection of its correspondent.[3] A bill of exchange or note received by a bank for collection which is payable at a distant place, must be seasonably transmitted by the receiving bank to a suitable bank or other agent at the place of payment.[4] A bank should neither send a check received by it for collection directly to the bank on which it is drawn, nor accept in payment a draft of the latter on another bank. But the collecting bank's negligence would be condoned by an order from the depositor to hold such a draft for a few days.[5] A suitable agent must be some other than the one who is to make the payment.[6] In receiving a note for collection a bank assumes the duty of taking the proper steps to fix the liability of the indorser, and for a neglect of that duty is responsible to the extent of the damages suffered thereby.[7] Commercial paper having been received by a bank for collection, there is an implied undertaking on its part that in case of its dishonor, the bank will take all steps necessary to protect the holders' rights against all previous parties to the paper.[8] A bank

[1] Sweeny *v.* Easter, 1 Wall. 166.

[2] Cody *v.* City National Bank, 55 Mich. 379.

[3] Guelich *v.* National State Bank, 56 Iowa, 434. As to the duty of a bank when a note is placed with it for collection, see Fabens *v.* Mercantile Bank, (1839) 23 Pick. (Mass.) 330; Phipps *v.* Millbury Bank, (1844) 8 Met. (Mass.) 79; Steele *v.* Russell, 5 Neb. 214.

[4] Drovers' National Bank *v.* Anglo-American P. & P. Co., 18 Bradw. (Ill.) 191.

[5] Hazlett *v.* Bank, 132 Pa. St. 118; s. c., 25 W. N. C. 282.

[6] Ibid. Bank *v.* Goodman, 109 Pa. St. 422.

[7] West *v.* St. Paul National Bank, (1893) 54 Minn. 466; s. c., 56 N. W. Rep. 54; Borup *v.* Nininger, 5 Minn. 523; Jagger *v.* National German-American Bank, 53 Minn. 386; s. c., 55 N. W. Rep. 545.

[8] Jagger *v.* National German-American Bank of St. Paul, (1893) 53 Minn. 386; s. c., 55 N. W. Rep. 545.

exercising reasonable care and skill in selecting an agent to present paper received for collection at a distant place will not be liable for that agent's default.[1] The duty of a bank, where it receives a bill or note for collection, and its transmission to another place is necessary, is discharged by sending it in due season to a competent, reliable agent, with proper instructions for its collection.[2] A collecting bank, in another city, cannot, on

[1] Stacy *v.* Dane County Bank, 12 Wis. 629; Lee *v.* Bank, 1 Chest. (Pa.) 109. As to a note payable at another place, left for collection with a bank, and its seasonably transmitting it to a suitable bank in that place for collection, and the transmitter not being liable for any negligence of the latter, see Fabens *v.* Mercantile Bank, (1839) 23 Pick. 330; Dorchester & Milton Bank *v.* New England Bank, (1848) 1 Cush. (Mass.) 177.

[2] Ætna Insurance Co. *v.* Alton City Bank, (1861) 25 Ill. 243. As to the question of liability of a bank, occurring from the acts of its correspondents, the Illinois court said: "Upon examination of the adjudged cases it will be found that entire harmony upon this question does not prevail. In the case of The Mechanics' Bank *v.* Earp, 4 Rawle, 384, it was held that a bank in which bills had been deposited, having only received them for transmission to their agents for collection, at the place of the residence of the drawees, with the instructions of the depositors, was not liable for the failure of the bank to whom the bills were transmitted to collect the money. In that case the court refers to the cases of Lawrence *v.* Stonington Bank, 6 Conn. 528, and The Bank of Washington *v.* Triplett & Neale, 1 Pet. 25, and Jackson *v.* Union Bank, 6 Harr. & J. (Md.) 148, as sustaining the rule announced. Again, in the case of The Bank of New Orleans *v.* Smith, 3 Hill (N. Y.), 560, the court held that when a bill is left with a bank for collection, and they transmit it in due season to a competent agent at the place of the residence of the drawee, with the necessary directions, that they thereby fully discharge their duty and incur no further liability. In support of the rule the court refers to the cases of East-Haddam Bank *v.* Scovil, 12 Conn. 303, and Fabens *v.* The Mercantile Bank, 23 Pick. 330. The court also refer to and approve of the case of Allen *v.* Merchants' Bank of N. Y., 15 Wend. 482, where the same doctrine is announced in these words: 'And we find, on an examination of these cases, they fully sustain the rule announced in this case.' It is true that the case of Allen *v.* The Merchants' Bank, 22 Wend. 215, decided by the Court of Errors, announces a different rule and reverses the decision of the Supreme Court. In that case the decision was by a divided court, the chancellor delivering a dissenting opinion. The last case extends the rule, so that a bank receiving commercial paper for collection is liable for loss resulting from neglect, to banks receiving such paper for transmission, where loss occurs by neglect of the agent to whom it is transmitted, and makes no distinction in the two classes of cases. Where a bank receives a bill or note for collection against a drawee or maker, resident at the place of the bank, or where the bank undertakes for its collection by their own officers, there can be no doubt that it would be liable for any loss that might result from neglect."

failure of its correspondent, the transmitting bank, credit the proceeds of a draft or note, sent to it for collection, to its own account. It is liable to the owner.[1] A bank will not be rendered liable for its omission to have a negotiable note, deposited with it for collection, protested, where a by-law of the bank required the costs of protesting to be deposited with it, which had not been done.[2] If bankers undertaking to collect bills, checks or notes for others neglect to give notice of the default of the makers, where it is the usage of banks to give such notice, they will be liable to the holders in damages.[3] A banker cannot hold the proceeds of a note, sent to him for collection and credit by a correspondent, against the real owner of the note to apply on the credit of collections sent him by this correspondent, because he may keep an account with that correspondent for his convenience, made up of money put there by him to draw exchange against it.[4] Where banks had kept account current with each other for years, crediting the one the other with paper received, etc., and the paper appeared to be the property of the bank remitting it, it has been held that there was a lien for general balance on the paper so transmitted, no matter who was the owner.[5] The bank, to which was originally transmitted, for collection, drafts drawn on a corporation, sending them to a third bank for collection, and the latter taking acceptances from the officer on whom they were drawn, instead of the corporation itself, has been held liable to the bank originally transmitting the drafts for the damage ensuing from the act of the third bank.[6] The accidental loss or disappearance in a bank of a bill sent to it for collection would be presumptive proof of negligence.[7] Where one places in a bank, for collection, notes and drafts on third persons, giving no instructions as to the kind of funds in which it may collect them, should

As to a bank being relieved of responsibility by using due diligence in the selection of the correspondent to which it transmits for collection a bill or note left with it for collection, see Daly *v.* Butchers & Drovers' Bank, (1874) 56 Mo. 94.

[1] Hackett *v.* Reynolds, 114 Pa. St. 328.

[2] Pendleton *v.* Bank of Kentucky, (1824) 1 Mon. (Ky.) 171.

[3] Smedes *v.* Utica Bank, (1823) 20 Johns. 372; Bank of Utica *v.* McKinster, (1833) 11 Wend. 473; Curtis *v.* Leavitt, 15 N. Y. 9, 167.

[4] Bury *v.* Woods, (1885) 17 Mo. App. 245.

[5] Bank of Metropolis *v.* New England Bank, 1 How. 234.

[6] Exchange National Bank *v.* Third National Bank, 112 U. S. 276.

[7] Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641.

the bank receive payment in a currency then in general use, of a depreciated character as compared with gold, the bank will be held liable only for the real value of such depreciated currency.[1] A bank receiving a check in payment of a note held by it against the drawer, after the check has been paid, cannot refuse to deliver up the note for cancellation on the ground that it had not matured.[2] A collection made by a bank after it has suspended, must be held by it as agent in trust for the owner.[3] The negligence of a collecting bank in not presenting a draft for payment, is the negligence of the holder.[4] A bank's duty, where a note is left with it for protest, is to exercise ordinary and reasonable diligence in giving notice.[5] A known custom to demand payment of a note, left with a bank for collection, without actually presenting the note to the maker in person, would be binding upon indorsers.[6] A known custom of a bank to demand payment on the day before, or the day after, a note falls due, would be binding on an indorser.[7]

§ 333. **Duty of bank.**— When a bill or note is received by a bank for collection in the ordinary course of business, without any special agreement on the subject, and the bank in due time

[1] Henry *v.* North. Bank of Ala., 63 Ala. 527, in which the collections were made in confederate money.

[2] Union Savings Association *v.* Clayton, (1878) 6 Mo. App. 587.

[3] Jockusch *v.* Towsey, 51 Tex. 129.

[4] Harvey *v.* Bank, 119 Pa. St. 212.

[5] Mount *v.* First National Bank, 37 Iowa, 457. As to liability of a bank, receiving note for collection and failing to notify indorsers of its protest, and thereby discharging them, for the holder's loss, see Bank of Washington *v.* Triplett, 1 Pet. 25; Bird *v.* Louisiana State Bank, 93 U. S. 96. As to the duty of bankers in such cases, see Britton *v.* Niccolls, 104 U. S. 757. As to liability for neglect on the part of a bank receiving a note for collection, see Thompson *v.* Bank, 3 Hill (S. C.), 77. As to a bank's being protected from liability by its usage, and not being liable for the negligence of a notary in the matter of demand and protest, see Warren Bank *v.* Suffolk Bank, (1852) 10 Cush. (Mass.) 582.

[6] Jones *v.* Fales, (1808) 4 Mass. 245; Whitwell *v.* Johnson, (1821) 17 Mass. 452; City Bank *v.* Cutler, (1826) 3 Pick. (Mass.) 414.

[7] Jones *v.* Fales, (1808) 4 Mass. 245; City Bank *v.* Cutter, (1826) 3 Pick. (Mass.) 414. What is a sufficient demand for payment of a note left with a bank for collection, see Tredick *v.* Wendell, 1 N. H. 80. The effect of usage on the part of banks concerning d mands on makers of notes, and notices to indorsers, see Lincoln & Kennebeck Bank *v.* Page, (1812) 9 Mass. 155; Smith *v.* Whiting, (1815) 12 Mass. 8; Blanchard *v.* Hilliard, (1814) 11 Mass. 85; Central Bank *v.* Davis, (1837) 19 Pick. (Mass.) 375; Chicopee Bank *v.* Eager, (1845) 9 Met. (Mass.) 583.

delivers it to the notary usually employed by it in such matters so that the necessary demand, protest and notice may be made and given, the bank will not be answerable for loss resulting from the failure of the notary to perform his duty.[1] Personal notice to the indorser may be dispensed with, and he will be charged by the bare deposit of notice in the post office, even if it never comes to hand.[2] In case a note payable on demand, at a particular place, be lost, a court of equity affords no remedy to the owner before a demand for payment has been made at the place designated.[3] A notice to a distant indorser of the protest, etc., of a note payable at bank must ordinarily be sent to his nearest post office, but this rule may be dispensed with if shown that the notice was sent to the place where the indorser would get the earliest intelligence.[4] In case the holder of a note delivers it to a bank with the understanding that this bank shall forward the note to another bank for collection, and it is so forwarded and received, the latter bank will be responsible to the owner of the note for any negligence in its colleetion whereof the owner of the note may suffer loss.[5] So where the latter bank delivers such note to the notary public for demand, protest and notice, such notary was the attorney of the bank and was incompetent for the purpose of making such demand and serving such notice, and the demand was not properly made and notice was not properly served, so that the indorsers of the note were entirely discharged, the bank was held responsible to the owner of the note.[6] A bank having received a note for collection with direction that it should receive payment of the note in New York exchange, it being a bank of exchange as well as of deposit, the Iowa Supreme Court held the acceptance in payment by the bank of its own certificate

[1] Citizens' Bank of Baltimore *v.* Howell, 8 Md. 530.

[2] Bell *v.* Hagerstown Bank, 7 Gill (Md.), 223.

[3] Streater *v.* Bank of Cape Fear, 2 Jones Eq. (N. C.) 31.

[4] Bank of the United States *v.* Lane, 3 Hawks (N. C.), 453. An illustration of a lack of diligence on the part of a bank in sending notice of dishonor of a protested bill of exchange to the indorser. Runyon *v.* Montfort, Busb. (N. C.) 371. As to liability of banks for neglect in protesting, etc., notes deposited with them for collection, see Chapman *v.* McCrea, (1878) 63 Ind. 360. As to available defense of bank when charged with such neglect, see Locke *v.* Merchants, National Bank, (1879) 66 Ind. 353. Liability of bank for failure to present a bill to the drawee, see Tyson *v.* State Bank, (1842) 6 Blackf. (Ind.) 225.

[5] Bank of Lindsborg *v.* Ober, (1884) 31 Kans. 599.

[6] Ibid.

of deposit payable on demand was a discharge of the indebtedness, notwithstanding its failure to remit the amount to the creditor and afterwards becoming insolvent, it appearing that on the day it received this payment the bank was paying its obligations and had money on hand with which the certificate could have been paid in cash if demanded, although it was actually insolvent, that fact not being known to the holder of the certificate.[1] The measure of damages in an action against a bank with which a bill has been deposited for collection, and it has failed to take proper steps to charge the drawer or indorsers, whereby the holder of the bill was unable to collect it, is the face of the bill, with interest.[2] By delivering a bill held by it for collection to a notary with instructions to protest on the wrong day, a bank would render itself liable to the owner of the bill.[3] It seems though that where negotiable paper is delivered to a bank for collection merely, the bank's duty will be discharged by a proper demand of payment, and by giving notice of its non-payment to the bank's principal only, without giving the proper notice also to other indorsers, unless some contract or commercial usage be shown to raise a more extended obligation.[4] In a Massachusetts case it appeared that a bank, holding a note for collection, received the amount from an agent of the maker, and by mistake gave up to him a similar note of another person and returned the first note to its owner, to whom the maker paid it on demand, and immediately, though four days after the payment to the bank, examined the note in his agent's hands, and, discovering the mistake, returned it to the bank and demanded back his money. The Supreme Court of Judicature held that he was entitled to recover it back, with interest from the time of the demand, although the bank had meanwhile paid the amount to the owner of the other note, the maker of which was insolvent and the

[1] British & American Mortgage Co. *v.* Tibballs, 63 Iowa, 468.

[2] American Express Co. *v.* Haire, (1863) 21 Ind. 4. For an illustration of the owner of a promissory note placed for collection through a bank and its correspondent not sustaining damage, see Indig *v.* National City Bank of Brooklyn, (1880) 80 N. Y. 100.

[3] Commercial Bank of Kentucky *v.* Varnum, (1872) 49 N. Y. 269. As to the liability of a collecting bank taking a draft which may be dishonored, see First National Bank of Meadville *v.* Fourth National Bank, 77 N. Y. 320; s. c., 33 Am. Rep. 618.

[4] State Bank of Troy *v.* Bank of the Capitol, (1863) 17 Abb. Pr. 364; s. c., 41 Barb. 343; 27 How. Pr. 57.

indorsers discharged for want of demand.[1] A contract to be so responsible, expressly proven or inferable from an unequivocal course of dealing, is necessary to hold a banker receiving paper for collection absolutely responsible for the amount previous to collection.[2] A bank will not be discharged from its obligations to procure a proper presentment and notice in case of non-payment of a note deposited with it by one of its customers for collection with a request to have it protested if not paid, by merely employing a notary for the purpose of making a demand.[3] Where presentment is not necessary to charge the parties, and would be useless if made, a bank with which a draft is placed for collection would not be liable for neglect to present it.[4] A maker of a note paying it to the bank holding it for collection cannot recover the payment from the bank on the ground that the bank has failed to remit to the owner.[5] A bank will not be held liable for an omission to protest notes deposited with it for safe-keeping and not for collection.[6] The plaintiff bank in a Connecticut case brought its action to recover of a national bank in the hands of a receiver the amount of notes or bills sent by it for collection to this bank. The circumstances were these: Its cashier had given notice to the cashier of the defendant bank to protest and return all paper not paid. The notes, drafts and checks of one of the makers which had been sent by the plaintiff bank to the cashier of defendant bank for collection and charged

[1] Andrews *v.* Suffolk Bank, (1859) 12 Gray (Mass.), 461.

[2] Scott *v.* Ocean Bank, (1861) 23 N. Y. 289, affirming 5 Bosw. 192.

[3] Ayrault *v.* Pacific Bank, (1868) 6 Robt. (N. Y.) 337; affirmed in 47 N. Y. 570.

[4] Mobley *v.* Clark, (1858) 28 Barb. 390. In Jacobsohn *v.* Belmont, 7 Bosw. 14, a banker, who, under peculiar circumstances, acted with the knowledge and concurrence of the owner of the paper in delaying to present it for collection was held not liable for negligence.

[5] Smith *v.* Essex Co. Bank, (1856) 22 Barb. 627.

[6] New Orleans Canal Co. *v.* Escoffie, 2 La. Ann. 830. As to diligence required of a bank receiving a note or bill for collection, and its liability in default of such diligence, see Capitol State Bank *v.* Lane, 52 Miss. 677. As to the rules governing as to demand and presentment of notes payable at bank, see Lewis *v.* Planters' Bank, 3 How. (Miss.) 267; Ellis *v.* Commercial Bank of Natchez, 7 How. (Miss.) 294; Harrison *v.* Crowder, 6 Smedes & Marsh. (Miss.) 464; Barlow *v.* Planters' Bank, 7 How. (Miss.) 129. When the note remains during the whole day of the day it falls due, allowing days of grace, see Duncan *v.* Watson, 6 Cush. (Miss.) 187; Goodloe *v.* Godly, 13 Smedes & Marsh. (Miss.) 233; Bland *v.* Commercial & Railroad Bank, 3 Smedes & Marsh. (Miss.) 250.

that the deposit was a full defense to the action of the payee or indorsee against the maker.[1] Notes payable at bank must be presented to the bank for payment to charge the indorser.[2] A bank would not be authorized to receive the money for the payee of a note not in its possession simply because the note was made payable at that bank.[3] When a note payable at a bank is held by it, the note should remain in the bank until the completion of business hours.[4] The known custom of a bank, that notice to the directors thereof, who are indorsers on notes, should be left on the cashier's desk, instead of being delivered to the directors, would be binding on the directors.[5] The practice of banks to give notice to the makers of notes of the time of their maturity cannot, where such notice has been delivered, be substituted for a demand for payment so as to charge the indorser.[6] A bank which by mistake has certified a promissory note made payable at its banking house to be "good" can correct such mistake before rights and liabilities have been incurred or losses sustained in consequence of it.[7] When a note is made payable at a bank, all that the holder is required to do is to make demand for payment at the bank.[8] Where a note payable at bank is left there, and remains during banking hours on the last day of grace, and no funds are provided for taking it up, that would be sufficient evidence of demand and refusal of payment.[9] In the absence of

[1] Ibid.

[2] Sullivan *v.* Mitchell, 1 Carolina Law Repository (N. C.), 482; Smith *v.* McLean, N. C. Term Rep. 72.

[3] Cheney *v.* Libby, 134 U. S. 68.

[4] Planters' Bank *v.* Markham, 5 How. (Miss.) 397. In Dewey *v.* Bowers, 4 Ired. (N. C.) 538, a bank received from the maker of a note which it had discounted a draft on New York and agreed to apply the proceeds, if the draft was collected, to the payment of the note after declining to receive the draft in discharge of the note. Afterwards the cashier of the bank, by mistake, supposing the draft to have been paid, canceled the note and delivered it to the principal. It was soon ascertained that the draft had been protested and never paid. It was held that the bank, under the circumstances, was entitled to recover from the principal and his trustees the amount of the note so canceled and delivered up.

[5] Weld *v.* Gorham, (1813) 10 Mass. 366. As to notice of protest by mail where that method of service is the usage, see Benedict *v.* Rose, 16 S. C. 629. As to notice by a bank of non-payment of note, see Bank *v.* Wallace, 13 S. C. 347.

[6] Farmers' Bank of Maryland *v.* Duvall, 7 G. & J. (Md.) 78.

[7] Second National Bank of Baltimore *v.* Western National Bank of Baltimore, (1878) 51 Md. 128.

[8] Bank *v.* Flagg, 1 Hill (S. C.), 177.

[9] Lafayette Bank *v.* McLaughlin, (Super. Ct. Cincinnati, 1846) 4 West. Law J. 70.

any special contract, a bank with which notes are deposited is only bound to receive the money, if paid, and, if not paid, to fix the liability of the parties by due demand and notice.[1] The maker of a note payable at bank will be presumed to consent to be governed by the custom of the bank with regard to making them and of payment of such notes.[2] Where, by the custom of a bank, notes payable there and in its possession and not paid during banking hours on the day on which they fall due, are considered as dishonored, without any formal demand, then no such formal demand and presentment would be necessary to charge an indorser.[3] Where the bank at which a note is payable is the holder, it would be a sufficient demand for the officers of the bank to hand it to a notary after banking hours, telling him there are no funds to meet it.[4] When discounting a note or bill, should a bank inquire of the one presenting it as to the indorser's residence, and send a notice to the place named, this would be sufficient to charge the indorser, even though he may never have resided at the place named.[5] A person indorsing a note with the knowledge of a custom of a bank not to give out notes for protest until three o'clock on the third day of grace would be bound thereby.[6] Where the known and established usage in a bank as to papers, the third day of grace on which falls on Sunday, is not to demand payment until Monday, the bank receiving a note, the third day of grace falling on Sunday, to be collected according to the known and established mode of transacting its business,

[1] Crow *v.* Mechanics' Bank, 12 La. Ann. 692.

[2] Harrison *v.* Crowder, 6 Smedes & Marsh. (Miss.) 464.

[3] Cohea *v.* Hunt, 2 Smedes & Marsh. (Miss.) 227. In Mount *v.* First National Bank, 37 Iowa, 457, the note was left with the bank for protest without direction as to where notice to the indorser was to be sent. The notice was sent by mistake to a person of the same name as that of the indorser and living in the neighborhood. The court held that the bank was not liable for negligence.

[4] U. S. Bank *v.* Carneal, 2 Pet. 543.

[5] Palmer *v.* Whitney, (1863) 21 Ind. 58. In Commercial & Railroad Bank *v.* Hamer, 7 How. (Miss.) 448, it was held that generally a note payable in bank should be presented for payment during banking hours, but where it was the custom of the bank to keep its back door open, with its teller present after banking hours to answer demands then made, and a note was then presented, and the teller answered, according to the truth of the case, that there were then no funds and had not been during the day to pay the note, the presentment was good.

[6] Bank of Columbia *v.* McKenny, 3 Cranch Cir. Ct. 361.

would not be liable to damage for omitting to demand payment on Saturday.[1]

§ 335. When a bank is liable for failure to collect a note. — An Ohio bank having purchased a note payable at the banking office of another bank, from the payee, the payee indorsing the same, sent it to the bank, at which the note was payable, for collection. The note was not paid when it matured, and the bank owning the note brought its action against the bank, its agent, for collection, upon the ground that by its negligence the owner had lost its right to hold the indorser liable. The trial court rendered a judgment in favor of the defendant. This judgment was reversed by the Supreme Court of Ohio, which held that the bank which held the note for collection had been guilty of negligence in the matter and was thereby liable to the owner of the note.[2]

[1] Patriotic Bank *v.* Farmers' Bank of Alexandria, 2 Cranch Cir. Ct. 560. As to liability of bank for negligence in such matters, see Bank *v.* Burns, 12 Colo. 539; s. c., 21 Pac. Rep. 714; Drovers' Nat. Bank *v.* Anglo-American Packing & Prov. Co., 117 Ill. 100; s. c., 7 N. E. Rep. 601; Bank *v.* Goodman, 109 Pa. St. 424; s. c., 2 Atl. Rep. 687; Farwell *v.* Curtis, 7 Biss. 162; Indig *v.* Bank, 80 N. Y. 100; Briggs *v.* Bank, 89 N. Y. 182. In Holmes *v.* Roe, 62 Mich. 199, it was held that where the person receiving a check upon a banker and the banker on whom it is drawn are in the same place, in the absence of special circumstances it must be presented for payment the same day or, at least, the day after it is received; but, if in different places, the check must be forwarded for presentment on the day after it is received at the latest. See, also, Hamilton *v.* Winona Salt & Lumber Co., (1893) 95 Mich. 436.

[2] Bank *v.* Bank, (1892) 49 Ohio St. 351. The opinion of the court evinces a full and careful discussion of the law relating to the questions involved, and shows such a statement of the facts which explain its ruling, that we give it in the words of the court. It was said: "The real contention between the parties was whether [the payee], the indorser of the promissory note, had been discharged from liability to the [plaintiff] by reason of the negligence of the [defendant]. The note had been transmitted to the [defendant] for collection and was not paid at maturity. If [defendant] by its negligence had discharged the indorser, then it should be held liable for the damage it thereby caused; but if, notwithstanding the alleged negligence, [the indorser] remained liable, it should be exonerated, for all the duty it owed to the [plaintiff], in case the note was not paid, was to take such action as would charge the indorser. When the note matured the [defendant] in error notified the makers and one of them came to its banking house. A plain and simple duty then confronted the [defendant]: Either to require payment of the note, or, in default thereof, to take such action as by the law merchant was necessary to

§ 336. What action on its part will relieve a collecting bank from liability.— The United States Circuit Court of Appeals for the sixth circuit has held that a bank receiving a certificate of deposit issued by a bank for collection and mailing it to the bank which issued it, with a request for a remittance, was guilty of negligence. But in this particular case it appeared that the plaintiff bank on May 8, 1888, mailed to the defendant bank the certificate of deposit for collection, and on May ninth the lat-

charge the indorser. It did neither. That the note was conditionally paid is suggested; what that may mean in this connection is not clear. No doubt, that, as between the holder and the maker of a promissory note, a conditional payment may be made; but the rules of the commercial law require a holder, who intends to hold an indorser liable, to give notice to the latter of the default of the maker. Anything less than a full and absolute payment is a default, but nothing less than that measures the duty of the maker. In this case, however, there was no conditional payment made. True, the [defendant] had in its hands the means of enforcing payment, but did nothing; it simply accepted the maker's promise that, if [the payee] did not give further time, they would pay the note. If the [defendant] had given notice to the [plaintiff] of the default of the maker, it would have discharged its duty, for it would have afforded the latter an opportunity to give notice to [the indorser]. Lawson *v.* Bank, 1 Ohio St. 206. Where, however, a holder of a promissory note passes by an immediate indorser, and serves notice of non-payment upon one more remote, he cannot avail himself of the time the immediate indorser would have had to serve the remote one if the holder had given notice to the former; but the holder in that case must give notice to the remote indorser within the same time that he is required to give it to the immediate indorser. 1 Parsons on Notes & Bills, 514; Dobree *v.* Eastwood, 3 Car. & P. 250; Simpson *v.* Turney, 5 Hump. 419; Rowe *v.* Tipper, 13 C. B. 249; Marsh *v.* Maxwell, 2 Camp. 210. Therefore, if the letter of [the makers] had been sufficient in form and substance to fix the liability of [the payee indorser] it was mailed too late and for that reason he was discharged. This release of [the indorser] was an accomplished fact before the makers of the note applied to him to extend the time of payment. The omission of the bank to require payment, or in default thereof to give the necessary notice to charge [the indorser] was caused by the solicitation of the makers. * * * The most careful scrutiny of the record fails to disclose that [the indorser], up to this time, said or did anything to mislead the bank or to induce it to relax its vigilance, or omit any step necessary in law to charge him as indorser. [The indorser], therefore, had a perfect defense against any action taken to charge him as an indorser, unless by his subsequent conduct he has forfeited his right to set up this defense." After discussing whether there was sufficient notice to the indorser and whether he was estopped to defend, the court then made this query: "Was due diligence shown in giving this notice?" This was answered as follows: "The last day of grace was October 17 and the letter was not mailed until the 19th, two

ter mailed it to the bank issuing it. On June first the defendant bank credited the plaintiff bank with the item in the account current for May, and wrote that nothing had been heard from the bank issuing the certificate after repeated inquiries, and requested that the matter be investigated and a duplicate or a

days later. To constitute due diligence it should have been deposited in the post office in time to have departed in the earliest mail to the residence of [the indorser] that departed after business hours on the 18th. Lawson v. Bank, 1 Ohio St. 206. It is true that if the [defendant] had chosen to give notice of non-payment to the [plaintiff] that the [plaintiff] would have had one day after it received notice within which to give notice to [the indorser] and in that case a notice to [by?] the [plaintiff] to [the indorser] on the 19th of October would have been in time. 1 Pars. on Notes & Bills, 513; Lawson v. Bank, 1 Ohio St. 206. On October 17, 1888, the day after the note matured, one of the makers * * * was called into this bank and his attention was directed to it; the makers then had funds in the bank which could have been applied to its payment, but upon [this maker's] representation that his firm was pressed for means it was induced to indulge them until they could apply to [the payee] for a short extension of the time of payment, promising to pay it if [he] refused to extend the time. After two days' delay, they mailed the letter of October 19, to which he received in answer [the payee's] letter of the 20th, granting the favor, of which the bank was at once advised; it thereupon continued to receive and pay out for the makers large sums of money until November 1, 1888, on which day the makers assigned their property in trust for their creditors, having assets sufficient to pay only a few cents on the dollar of their indebtedness. No doubt but for this letter of [the payee's] the bank would have charged this note against the maker's deposits, and in that way demand its payment. If [the indorser] had been influenced by the facts, and chose to grant an extension to the makers, and the bank relying thereon had paid out all the funds of the makers before the assignment was made, and thus lost its means of indemnity, he should be held to abide the consequences. But he had no such knowledge. He neither knew that he had been discharged by the bank's neglect, nor that the bank had indemnity within its control. His granting the extension was an indiscreet act in itself, and he should not be charged with consequences that he had no reason to suspect would flow from it. On the contrary, this bank [the defendant here] was an actor in the entire transaction. With means of payment in its hands, it chose to indulge the makers in direct violation of its duty to the [plaintiff]. It knew this indulgence was granted to the makers of the note, expressly, to enable them to apply for an extension of payment to one who, upon the face of the paper, was only liable in case it did the very duty that it must of necessity violate to grant the indulgence. And when the letter from [the indorser] was made known to it, and it proceeded to act upon the extensions granted, it had no reason to believe that he had granted the extension with knowledge of the facts, and it took no action to advise him of their existence. Under these circum-

remittance obtained from the issues of the certificate. On June twenty-second, having received no answer to this letter, the defendant bank wrote the plaintiff bank that repeated letters about the item had remained unanswered, that they had written the plaintiff bank for a duplicate, and that they now charged the plaintiff bank with the item, which was accordingly done in the account current for June. This closed the correspondence with reference to the matter. The issuers of this certificate continued in good credit until after January 1, 1889, when they failed. The Court of Appeals held that under these facts the defendant bank was not responsible to the plaintiff bank for more than nominal damages, approving of the instruction of the lower court that those letters and the charging back amounted to a renunciation of the defendant's agency so far as the defendant could renounce it, adding that the defendant could not, by its renunciation, put an end to the agency as the facts then were, and relieve itself from liability without the consent, express or implied, of the plaintiff, and that such consent would be implied from the silence of the plaintiff after being informed of the renunciation; and that if the plaintiff made no objection to the renunciation, the defendant was not liable for damage thereafter resulting from events subsequent, and not from the sending of the certificate to the issuers for collection.[1]

§ 337. **Rules as to checks and drafts.**— A bank receiving a bill for collection from another bank, becomes the agent of the remitting bank and not of the owner of the bill, and, in the absence of agreement to the contrary, would be answerable to the remitting bank for neglect in the discharge of its duties as agent, whereby that bank sustains loss or damage.[2] It is the duty of a bank receiving for collection a bill payable at a future time to use due diligence in presenting it and in giving notice of a failure of due acceptance, or where a bank receives a bill for collection, presents it for acceptance, and gives no notice of non-acceptance, it

stances [the defendant] must be held to have assumed the risks that naturally flowed from its actions, one of which was that [the indorser] might avail himself of a defense thus afforded to him by its own negligence."

[1] First Nat. Bank of Evansville *v.* Fourth Nat. Bank of Louisville, (1893) 56 Fed. Rep. 967.

[2] Commercial Bank *v.* Union Bank, (1854) 11 N. Y. 203.

will be held liable to the owner for the amount of the bill in case the acceptance be defective.[1] A bank acting merely as collecting agent of drafts, without knowledge that the money collected was to be received in any way for its own benefit, or to be applied on an indebtedness to it, or on its own account, will not be held to have received the money in payment of its indebtedness or on its account.[2] A bank receiving a draft for collection, with instructions from the holder of the draft to collect the money due on it and hold the same until called for, by crediting it to the account of another in violation of the instructions, will become liable to the holder for whom collection was made.[3] Where a collection of a draft is made for the owner under a direction of himself, or some one accompanying him, given in his presence and hearing, to hold the money until one or the other of the two should give further directions as to the disposition of the money, and this other person afterwards have the money paid to himself or placed to his credit to make good an overdraft on his own account, the bank would not be liable to the owner for the sum collected.[4] It is the duty of the bank with which a check or bill is deposited for collection, to transmit it to a suitable agent to demand payment in such a manner that no loss may happen to any party to the check, whether the drawer, indorser or indorsee.[5] The acceptor of a bill of exchange, discounted by a bank, with bill of lading attached, which the acceptor or other bank regarded as genuine at time of acceptance, but which proved to be a forgery, has been held bound to pay the bill to the bank at maturity.[6] The rule upon which this holding was made was that bad faith in taking negotiable paper, which will defeat recovery thereon, must be something more than failure to inquire into their consideration, because of rumors or general reputation as to bad character of maker or drawer.[7] The words "for collection," appended to

[1] Walker *v.* Bank of State of New York, (1854) 9 N. Y. 582, affirming 13 Barb. 636.

[2] Merchants' Bank of Canada *v.* Union R. R. & Transportation Co., (1877) 69 N. Y. 373.

[3] International Bank *v.* Ferris, 118 Ill. 465.

[4] Ibid.

[5] Drovers' National Bank *v.* Provision Co., 117 Ill. 100.

[6] Goetz *v.* Bank of Kansas City, 119 U. S. 551.

[7] Ibid. When the holders of drafts must bear the loss where they have not been returned or presented in a reasonable time and the drawer has become insolvent. Collingwood *v.* Merchants' Bank, 15 Neb. 121.

an indorsement upon a check, limit the effect which the indorsement would have without them and give authority to the holder only to collect for the benefit of the indorser.[1] It may be shown by a bank taking a certified check on another bank, either as a payment, on account, or for the purpose only of collection, that the check had availed nothing, where the bank so receiving the check may have discharged its duty by an effort to collect it.[2] A bank receiving a check for collection and retaining it for four days without presenting it for payment, or making any offer for its collection, or giving any notice to the depositor of its non-payment, has been held in North Carolina liable for loss ensuing therefrom.[3] Where a bank received a check upon itself for collection, being at the time a large creditor of the drawer, and failed without excuse to notify the depositor of the non-payment of the check, it was held guilty, in law, of negligence, and that by its action the bank had made the check its own and was liable for its whole amount.[4] A bank receiving a check for collection payable at a day subsequent, would be liable to the owner for failing to present it at the proper time where it had presented it for payment without allowing days of grace.[5] A bank receiving

[1] Hoffman *v.* First National Bank of Jersey City, 17 Vroom (N. J.), 604.

[2] Drovers' National Bank *v.* Provision Co., 117 Ill. 100. In Bickford *v.* First National Bank of Chicago, (1866) 42 Ill. 238, the check was drawn and certified and deposited in a bank after ten o'clock A. M., and before three o'clock P. M. on a certain day, where it remained until next morning, when it was taken in the usual course of business to the bank on which it was drawn. The bank was closed and continued so. The check was protested for non-payment and due notice given. The Supreme Court of Illinois held that there was sufficient diligence to hold the owner of the check. In New York, etc., R. R. Co. *v.* Smith, 4 N. J. Law J. 34, a certified check was given on a New York bank to the agent of the railroad company in Newark. By a rule of the company the agent could not indorse the check, but was required to send it to the principal office in New York city. Two days after the check was given it was returned in due course of collection to the Newark bank, which had meanwhile failed. It was held that there was no negligence in the presentation of this check which would prevent the company recovering the amount of the check from the drawer.

[3] Bank of New Hanover *v.* Kenan, 76 N. C. 340.

[4] Ibid. An illustration of no want want of reasonable diligence in the presentation of a check for payment. Werk *v.* Mad River Valley Bank, (1858) 8 Ohio St. 301. As to the effect of delay in presenting check for payment, see Stewart *v.* Smith, (1867) 17 Ohio St. 82; McGregor *v.* Loomis, (1850) 1 Disney (Ohio), 247.

[5] Ivory *v.* Bank of Missouri, (1865), 36 Mo. 475.

from a depositor a check upon another bank for collection, should the collection fail, without fault of the bank receiving the check for collection, has a right to return the check and cancel the credit given the depositor for the amount.[1] The bank in an Indiana case, holding a check drawn in its favor, indorsed it to a bank "for collection for account of" itself, and sent it by mail to this bank with a letter from its cashier, stating, "I inclose for collection and cr., as stated below" (specifying this and other checks and drafts sent). The check was placed by this bank on its collection register, where were entered only such checks received for collection as were treated as the property of the parties sending them, no credit being given therefor until they were collected. The cashier of this bank indorsed the check for collection and transmitted it to a third bank, with authority by letter to credit the second bank with the proceeds when collected. On the same day the transmitting bank failed and went into the hands of a bank examiner. Two days afterwards the third bank collected the check, with notice by newspaper report of the failure of the second bank, but not notifying the drawee of this fact of which they had no notice. The collecting bank then credited the failed bank with the amount collected on the check, it being then, on account of previous dealings, legally indebted to it. The bank examiner also having in charge the books of the failed bank, without the consent of the remitting bank, credited it and charged the collecting bank with the amount of the check on the books of the failed bank, which, at the time it received the check, was largely indebted to the remitting bank. In this action, brought by the latter against the collecting bank, the court held that it was entitled to recover; that the indorsement of the check to the failed bank did not vest title in it, or give it any right to the proceeds; that the accompanying letter meant that it should collect for the remitting bank and place the proceeds to its credit and not that the failed bank should treat the check as its own or credit the remitting bank therewith before collection; that the transaction did not make the former the debtor of the latter before the check was collected, or deprive the latter of its rights to the check or its proceeds before its collection by the former;

[1] Decatur National Bank *v.* Murphy, (1881) 9 Bradw. (Ill.) 112. See, also, National Gold Bank *v.* McDonald, 51 Cal. 64; Boyd *v.* Emerson, 29 E. C. L. 68.

that the collecting bank was the agent of the failed bank, and being notified by the indorsement on the check that the latter was not the owner of it or entitled to its proceeds, the former had no right to credit the amount to the latter on its indebtedness to the former; that the notice it had of the failure of its correspondent was sufficient to require the collecting bank to regulate its action with a view to the rights of the remitting bank, as affected by the failure of its correspondent; that the directions in the letter of the cashier of the remitting bank to the failed bank constituted an authority to mingle the fund with the general funds of the bank when collected, whereby the former bank would become a general creditor of the latter instead of being entitled to the fund; that the insolvency and suspension of the latter operated as a revocation of such authority, and if it had authority to collect at all after its suspension, the former bank would be entitled to the specific fund, and the collecting bank, being an agent of the failed bank, had no more power or right as to the specific fund than its principal; that the rights of the remitting bank were not injuriously affected by anything done by the bank examiner with its knowledge or consent, and that the fact that the collecting bank had credited the amount collected upon its debt against the failed bank, did not discharge it from liability.[1] A bank to which an inland bill of exchange is transmitted for collection through the intervention of another bank, becomes the agent of the payee and is answerable to him alone for any breach of its duty in relation to the bill.[2] Where accounts are kept between different banks, and one of them fails to pay over money received on drafts or bills of exchange collected for the other, the remedy is against the defaulting bank, and not against the drawer of the bill or draft.[3] Should a bank receive a bill for collection and omit to present it at the proper time or place for payment, and a loss be sustained in consequence of such an omission to present it for payment, the bank would be liable to the extent of the loss.[4] And the right of action against the bank would not be waived by the owner of the bill withdrawing it from the custody of the bank; nor would

[1] First National Bank v. First National Bank, (1881) 76 Ind. 561.

[2] Farmers' Bank v. Owen, 5 Cranch Cir. Ct. 504.

[3] Kupfer v. Bank of Galena, (1864) 34 Ill. 328.

[4] Branch Bank at Montgomery v. Knox, (1840) 1 Ala. 148.

the bank be discharged from its liability to answer for its negligence by the pursuit of any of the parties liable upon the bill.[1] The facts of a case in the federal court for the district of Colorado were as follows: The bank sued here received from the plaintiff bank a sight draft for collection, drawn by the plaintiff bank on a third bank against funds actually to the credit of the drawer; the defendant received this draft for collection January tenth, and transmitted it directly to the drawee, its correspondent, on the same day; it should have reached the drawee in two days; the drawee continued good until January twenty-ninth, when it failed. The drawee did not acknowledge the receipt of the draft, and, in fact, the draft miscarried and never reached the drawee; the defendant made no inquiries about it until February ninth; the plaintiff and defendant both supposed, meanwhile, that the draft had been paid; the defendant gave the plaintiff no notice of any kind in respect of the draft until February eleventh. In its action against the collecting bank to recover the amount of the draft, the collecting bank was held liable on the ground that, by its negligent omission of duty, a loss had resulted to the plaintiff.[2] The measure of damages in such a case was held to be the

[1] Ibid. As to the time within which the holder of a bill of exchange must present it for acceptance, see Bank of Bennington *v.* Raymond, 12 Vt. 401.

[2] First National Bank of Trinidad *v.* First National Bank of Denver, (1878) 4 Dill. 290. DILLON, C. J., said: "I have fully examined the adjudged cases relating to the duty and responsibility of a bank which undertakes to act as a collecting agent for its customers or for other banks. They clearly show that the defendant bank ought to have ascertained, within a reasonable time, whether the draft transmitted had been received by its correspondent, and if not to have advised the plaintiff thereof. The practice of banks to send such checks or drafts *directly to the drawee* (as in this case) is attended with some obvious additional peril, and does not weaken, if indeed it does not increase, the diligence required of the collecting bank in respect to inquiry and notice. The defendant bank allowed an unreasonable time to elapse before it made inquiry concerning the draft, and more than a reasonable time had elapsed before the failure of the Kansas City Bank occurred. It was this negligence that caused the loss, since it is established by the evidence that the draft would have been paid if it had been presented at any time before the suspension of the drawee on the 29th day of January. Here, then, was an unexcused delay for fifteen or sixteen days to make any inquiry or give any notice. Aside from the custom or usage pleaded in defense * * * the decisions in England and in this country are uniform that such delay to make inquiry and omission to notify the party interested, as occurred in this case, impose a liability if loss is thereby occasioned."

full amount of the draft.[1] In an early Connecticut case it appeared that the plaintiff had drawn a bill of exchange, payable to his order, upon a person residing in the city where the defendant bank did business; that he indorsed it in blank and lodged it with a New York bank for collection; that the cashier of that bank indorsed it in blank and forwarded it to a bank in Connecticut, the cashier of which indorsed it in the same manner and transmitted it to defendant bank, each of these indorsements being made for the purpose of collection only. The money was paid to the defendant bank by the acceptor, and the defendant claimed in this action of the drawer the right of treating it as a collection on account of the Connecticut bank, through which it came to defendant, and to set off the avails of the collection to the credit of that bank upon the general account between the banks. The Supreme Court of Connecticut held that the defendant was not the factor or banker of the Connecticut bank through which it received the bill, and as agent, or in any other capacity, did not have a lien on the avails of the bill for the general balance of its account with that bank.[2] They further held that the custom of transmitting bills for collection from one bank to another, and crediting on account the avails received, whatever effect it might have had between themselves, could not affect the claims of a third person, who may have confided the collection of a bill to one of them, without assent, either express or implied, to the mode of transacting their business.[3] Where a draft was deposited

[1] First National Bank of Trinidad *v.* First National Bank of Denver, (1878) 4 Dill. 290.

[2] Lawrence *v.* Stonington Bank (1827) 6 Conn. 520. The court referred as follows to certain English cases: "In Jourdaine *v.* Leprone, 1 Esp. 66, it was said by Lord KENYON that a banker had a lien on a note paid into his house, and of course a right to retain it for his general balance. The doctrine more clearly appears from the case of Davis *v.* Bowsher, 5 Term Rep. 488. A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them in order to secure the payment of his general balance. These cases, and others to the same effect, are inappropriate to the one before us. The transaction of sending notes for collection from one bank to another has no analogy to the payment of notes to a banker and obtaining discount on a part of them."

[3] Lawrence *v.* Stonington Bank, (1827) 6 Conn. 521. That bills of exchange must be presented to the drawees in a reasonable time, and that

in a bank without directions that it should be treated as a separate fund, and was forwarded for collection to another bank, which failed, and the drafts and deposits between the two banks had been constantly changing, it has been held that the owner of the draft should share *pro rata* with other creditors.[1] Where shown in an action against a bank for money received to its credit that the bank was employed to collect certain drafts, and that the money was paid to its correspondent, a bank in the place where the drawee lived, and that the correspondent forwarded a draft for the money to the defendant, it would devolve upon the latter to show that, through no default or want of diligence on its part, the draft was not paid.[2] Where acceptance of a draft is refused, it is not necessary to present the draft for payment.[3] A bank receiving a bill for collection becomes the agent of the owner, and in the discharge of its obligations as his agent is bound to present it for acceptance without reasonable delay, and to present it for payment upon maturity; if not accepted or not paid when presented the bank should take such steps by protest and notice as are necessary to charge the drawer and indorser. Otherwise,

what is a reasonable time depends upon the facts in each case, see Montelius *v.* Charles, 76 Ill. 303; Walsh *v.* Dart, 23 Wis. 334; Knott *v.* Venable, 42 Ala. 186; Veazie Bank *v.* Winn, 40 Me. 60; East River Bank *v.* Gedney, 4 E. D. Smith, 582; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501; Fugitt *v.* Nixon, 44 Mo. 295; Aymar *v.* Beers, 7 Cow. 705; Sice *v.* Cunningham, 1 Cow. 397; Robinson *v.* Ames, 20 Johns. 146; Bachellor *v.* Priest, 12 Pick. 399; Wallace *v.* Agry, 4 Mason, 336.

[1] Edson *v.* Angell, 58 Mich. 336.

[2] Simpson *v.* Waldby, 63 Mich. 439. As to the responsibility of a bank employed to collect drafts upon parties at a distance for the failure or dishonesty of its correspondent selected by itself, see Simpson *v.* Waldby, 63 Mich, 439. As to the right of the owner of a bill remitted through a bank for collection to recover it of the bank, notwithstanding the latter's placing the amount to the credit of its correspondent in settling the latter's indebtedness to it, see Millikin *v.* Shapleigh, (1865) 36 Mo. 596.

[3] Exeter Bank *v.* Gordon, 8 N. H. 66, 78. In Nunnemaker *v.* Lanier, (1867) 48 Barb. 234, the bankers had received for collection a draft upon a trust company, and on presenting the same at their office received in payment the check of the trust company upon a bank and surrendered the draft. The bankers neglected to present the check for payment on the day they received it, and before banking hours on the next business day the trust company suspended payment and its check was dishonored on presentation. The Supreme Court of New York held that the bankers, by surrendering the draft, assumed the responsibility of taking the check of the trust company in payment, and that the existence of a custom in the city of New York among business men to take the checks of the trust company without certifica-

it becomes liable to the owner for the damages which he may sustain by such neglect to perform its duties, unless there be some agreement to the contrary, express or implied.[1]

§ 338. Negligence of a bank as to check held for collection. — In a late Kansas case the payee of a check upon a bank brought action against the drawer, basing his action upon the fact that there was money to the credit of the drawer in the bank, and the bank becoming insolvent, had made an assignment, and the check came back unpaid. It appeared that the payee of the check had placed it in the hands of his bank as his agent for collection, and the latter had sent it to the drawee for collection. The question for decision by the Supreme Court of Kansas was stated to be whether the negligence of the payee and his agent, his bank, in sending the check directly to the drawee operated, under the facts agreed upon, to discharge the drawer from liability. The court said: "From the agreed statement it appears that the check reached Richfield on the 12th of December, 1889, after business hours; that the bank on which it was drawn was open, doing a general business, receiving deposits and paying money on checks during its regular banking hours on the thirteenth. During that day a letter was written, addressed to the [payee's bank], with which was inclosed the check and the statement 'No funds in bank.' This letter was deposited in the post office after banking hours, and received at [the place where the check was drawn] after business hours on the fourteenth. The refusal to pay was, therefore, not communicated to any one until the fourteenth. Can it be presumed that if the check had been regularly presented over the counter to the Richfield Bank on the thirteenth a false answer would have been given, as was in fact given by letter and payment refused? It is admitted that the defendant had more than money enough to his credit to meet the check. Had presentment been made by another agent of the plaintiff and payment refused, steps might have been taken immediately to protect the drawer's rights; but, the check being in the hands of the drawee, of course no effort could be made by it to prosecute itself, and the fact that payment was refused was not communi-

tion, in the same manner as bank checks, was no defense to an action by the owners of the draft to recover the amount of the same.

[1] Montgomery County Bank *v.* Albany City Bank, (1852) 7 N. Y. 459.

cated to the [payee's bank] until the night of the day following the last one on which the Richfield Bank was open for business. It might be that the answer 'No funds in bank' was literally true, and that the Richfield Bank had not the money with which to make payment at any time during the day of the thirteenth; but we are not at liberty to indulge in any presumptions of that kind, the agreed facts showing that it received deposits and paid checks during the whole of that business day. This case must be decided in accordance with established principles, and the fact that the Richfield Bank was a small concern in a very sparsely peopled part of the state, and perhaps never had any large amount of funds in its possession, cannot be made a pretext for breaking down those wholesome rules of business which have been built up and defined with so much care and precision. The request in this case by letter was not an ordinary demand of payment calling for current funds, but was a request for Kansas City exchange, which the drawee would of course be at perfect liberty to refuse. In cases of this kind a hardship necessarily results to one party or another. Courts, in their decisions, must be guided by fixed rules. The plaintiff, having trusted in the good faith of the Richfield Bank by sending the check to it, must bear the burden of the loss occasioned by its failure occurring after the day on which regular presentment should have been made."[1] It

[1] Anderson *v.* Rodgers, (Kans. 1894) 36 Pac. Rep. 1067, 1069. The ruling was the result of an application of the principles declared in these words: "It is true, as was said by this court in Gregg *v.* George, 16 Kans. 546, that 'in order to charge the drawee of a check, the same strict rule of diligence in making demand and giving notice of non-payment does not obtain as in cases of ordinary bills of exchange. As a general rule he is not discharged unless he suffers some loss in consequence of the delay of the holder.' If the drawee of a check has no funds on deposit to meet it, or if, having funds in the bank at the time, he afterwards withdraws them, and the check is not paid on that account, the drawee [drawer?], having suffered no injury by reason of delay in its presentment, will not be discharged from liability; but when a person, having funds on deposit in a bank, draws a check against them, the holder of the check, if he delays its presentment, assumes the risk of the failure of the bank. It is said in Daniels on Negotiable Instruments, (§ 586): 'The fact that the check is presumed to be drawn against deposited funds makes it of even greater importance than, in the case of a bill, that a check should be presented, and that the drawer should be notified of non-payment in order that he may speedily inquire into the causes of refusal, and be placed in a position to secure his funds which were deposited in the bank.' The rule, however, as to the time allowed the holder for presentment of a check, in order to relieve him from the risk of loss by

would not be negligence on the part of a bank receiving a check from one of its customers for collection to forward the check by mail; but if, failing to hear from it within a reasonable time, the bank neglects to make inquiry or give notice, this would be negligence, and the bank would make itself liable for ensuing loss occasioned by the drawer's insolvency.[1]

§ 339. When a bank collecting a draft is liable to the owner.— It was held in the federal court for the district of Indiana that a bank which was an indorsee for collection for

failure of the drawer, is definitely fixed by the authorities: (1) Where the payee to whom the check is delivered receives it in the place where the bank on which it is drawn is located, he must present it by the close of banking hours on the next business day. (2) Where the check, as in this case, is drawn on a bank located at a place distant from that in which it was received by the payee, it must be sent for presentment for payment by mail on the next secular day after it is received, and presented on the next day after its receipt. In this case the check seems to have been forwarded for payment in due time, but it was sent directly to the drawee by mail, with the request that the bank of Richfield remit the amount by mail in exchange on Kansas City. The [payee's bank], therefore, elected the drawee of the check as its agent for collection. That this was negligence is well settled by the authorities. It is said in Daniel on Negotiable Instruments (volume 1, § 328a), 'For the purposes of collection, the collecting bank must employ a suitable sub-agent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself.' This proposition is sustained by abundant authorities. Drovers' Nat. Bank *v.* Anglo-American Packing & Provision Co., 117 Ill. 100; s. c., 7 N. E. Rep. 601; Bank *v.* Burns, 12 Colo. 539; s. c., 21 Pac. Rep. 714; Bank *v.* Goodman, 109 Pa. St. 422; s. c., 2 Atl. Rep. 687; First Nat. Bank of Evansville *v.* Fourth Nat. Bank of Louisville, 6 C. C. A. 183; s. c., 56 Fed. Rep. 967; Farwell *v.* Curtis, 7 Biss. 160; s. c., Fed. Cases, No. 4,690." It was insisted before the court that inasmuch as the check was forwarded in due time and came into the hands of the drawee, which refused payment, and returned the check with the statement "No funds in bank," the defendant was not injured by the mode of presentment; that an answer of "No funds," sent by mail, was as effectual a refusal to pay as though made across the counter at the bank. To this the court said: "Where due presentment is not made the burden of proof is upon the holder of the check to show that the drawer has not suffered injury." Ford *v.* McClung, 5 W. Va. 166; 2 Pars. Notes & B. 71; 2 Dan. Neg. Inst. § 1588; Daniels *v.* Kyle, 1 Ga. 304.

[1] Shipsey *v.* Bowery National Bank, (1875) 59 N. Y. 485.

account of a prior indorsee for collection was liable to the owner of the draft for the amount collected, and not remitted to the owner or the prior indorsee, notwithstanding credit for the amount was given the latter and he charged the collector and credited the owner, and was charged for the same by the owner, and though the collector, by virtue of an agreement with its indorser, whereby the amount due from one to the other for collections was to be placed to the latter's credit with a certain bank, wrote to that bank to place the amount to the credit of the prior indorser, which order it could have countermanded after notice of the latter's failure.[1] In a case in the federal court it appeared that the owners of a bill of exchange sent it to a certain bank indorsed by them for collection. At the time the bank received the bill of exchange it was insolvent, to the knowledge of its managing officer, and on that day, or following morning, it failed. Prior to its failure this bank indorsed the bill of exchange to another bank, which collected it and kept the proceeds, crediting the insolvent bank, which was indebted to it, with the amount collected. The court held that the first bank acquired no title because of its fraud in not disclosing its insolvency, and the collecting bank had no better title, as the owner's indorsement showed that the bank was merely the owner's agent to collect the proceeds.[2]

§ 340. **When indorser of a check is relieved of liability.**— The question of liability of an indorser of checks drawn payable to his order, by one upon a bank with which the latter kept an account, to the bank in which he placed the checks, they being received as cash as shown by the record of the case, and not for collection by the bank, has been considered in a recent case before the Nebraska Supreme Court. There had been delay in the presentation of the checks, and the court declined to lay down any rule by which the indorsee of a check must present the same for payment in any given time to hold the indorser. But in this

[1] Commercial Nat. Bank of Cincinnati *v.* Hamilton Nat. Bank of Ft. Wayne, (1890) 42 Fed. Rep. 880. See Sweeny *v.* Easter, 1 Wall. 173; Bank of the Metropolis *v.* First Nat. Bank of Jersey City, 19 Fed. Rep. 303; Bank *v.* Armstrong, 39 Fed. Rep. 684; First Nat. Bank of Chicago *v.* Bank, 3 Fed. Rep. 257; Blaine *v.* Bourne, 11 R. I. 119; Bank *v.* Hubbell, 22 N. E. Rep. 1034; White *v.* Bank, 102 U. S. 658.

[2] Peck *v.* First National Bank, (1890) 43 Fed. Rep. 357.

particular case they held that the checks were not presented in a reasonable time.[1]

[1] First National Bank of Wymore *v.* Miller, 37 Neb. 500. The court considered the question as to whether the indorsee was damaged by the delay in presenting the checks was wholly immaterial, upon the rule stated, as they said, in the following cases: "In Northwestern Coal Co. *v.* Bowman & Co, 69 Iowa, 150, the court say, after deciding that the plaintiff had held the check in question an unreasonable time before presenting it, and that it could not recover against indorsers: 'The fact that the drawer had no funds in the hands of the drawee when the check was drawn, makes no difference.' In Gough *v.* Staats, 13 Wend. 549, the Supreme Court of New York say: 'If there has not been due diligence in presenting the check for payment, the indorser is discharged, although he has not been prejudiced by the delay.' The Nebraska court said further: 'The authorities all say that in order to hold an indorser of a check it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time, depends upon the facts and circumstances of each particular case.' The facts in this case were that the checks were placed in the bank about the close of banking hours, on the 31st day of May, 1890. The bank on which they were drawn was in a place twenty-seven miles distant from the location of the bank receiving them, and a mail left the latter place at 6 P. M. daily, arriving at the place where the bank upon which the checks were drawn was located, at 9 P. M. of the same day. The bank receiving the checks made no inquiry of the bank on which they were drawn, as to whether the checks were good, nor did it at any time advise that bank that it held the checks, but on the day of their receipt mailed them to a bank in another state, which bank sent them by mail to a bank in Omaha, Nebraska, which bank in turn sent them by mail to the bank on which they were drawn, they arriving there on June 5, where they were then protested for non-payment. In Smith *v.* Janes, 20 Wend. 192, the Supreme Court of New York say: 'The holder of a check can recover against the indorser only when he has used due diligence in presenting or giving notice of demand and non payment. * * * Where the parties all reside in the same place, the check should be presented on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated, it should be forwarded by the mail on the same or the next succeeding day for presentment.' See, also, Holmes *v.* Roe, 62 Mich. 199. In Mohawk Bank *v.* Broderick, 10 Wend. 304, the Supreme Court of New York say: 'A check on a bank for the payment of money, to charge an indorser, must be presented with all dispatch and diligence consistent with the transaction of other commercial concerns, and it was accordingly held, where a check was received in Schenectady on the 14th of January, drawn on a bank in Albany, a distance of sixteen miles from the former place, and between which places there is a daily mail, and not presented until the 6th of February, that laches was imputable to the holder, and that the indorser was discharged. Although it is said that checks are like inland bills of exchange, and are to be governed by the same principles, greater diligence is required in presenting them than in presenting bills of exchange.' This case was affirmed by the Court for the Correction of Errors in 13 Wend. 133. See to the same effect Northwestern Coal Co. *v.* Bowman, 69 Iowa, 150."

END OF VOLUME I.